

ATTACHMENT I

*Simplification v.
Block Financial Corp.*

*Hearing
June 5, 2008*

*Hawkins Reporting Service
715 N King Street
Suite 3
Wilmington, DE 19801
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
SIMPLIFICATION, LLC,)
Plaintiff,)
) C.A. No. 03-355-JJF
v.) C.A. No. 04-114-JJF
) CONSOLIDATED
BLOCK FINANCIAL CORP.,)
and H & R BLOCK DIGITAL)
TAX SOLUTIONS, INC.,)
Defendants.)
Thursday, June 5, 2008
2:47 p.m.
Courtroom 4B
844 King Street
Wilmington, Delaware
BEFORE:
THE HONORABLE JOSEPH J. FARNAN, JR.
United States District Court Judge
APPEARANCES:
MORRIS, NICHOLS, ARSHT & TUNNELL
BY: MARY B. GRAHAM, ESQ.
BY: JULIE HEANEY, ESQ.
-and-
VENABLE, LLP
BY: PETER J. CURTIN, ESQ.
BY: DAVID FARNUM, ESQ.
BY: MICHELLE MARCUS, ESQ.
BY: MEAGHAN KENT, ESQ.
Counsel for the Plaintiff

[1] APPEARANCES CONTINUED:
[2]
[3] YOUNG, CONAWAY, STARGATT & TAYLOR, LLP
[4] BY: KAREN L. PASCALE, ESQ.
[5] -and-
STANDLEY LAW GROUP, LLP
BY:

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BY:
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JEFFREY S. STANDLEY, ESQ.
MARK R. ENGLE, ESQ.
Counsel for the Defendants

[1] THE COURT: All right. Be seated,
[2] please. Good afternoon.
[3] MS. HEANEY: Good afternoon, Your
[4] Honor. Julie Heaney for plaintiff,
[5] Simplification. I would like to reintroduce to
[6] you Peter Curtin of the Venable firm, and his
[7] colleagues sitting at the table, Michelle Marcus
[8] and David Farnum.
[9] THE COURT: Good afternoon.
[10] MS. HEANEY: And Meaghan Kent and
[11] Mary Graham from our office is here.
[12] THE COURT: Good afternoon.
[13] MS. PASCALE: Good afternoon, Your
[14] Honor. Karen Pascale from Young, Conaway for
[15] the defendants, Block Financial Corporation and
[16] H & R Block Digital Tax Solutions. And I would
[17] like to introduce from the Standley Law Firm,
[18] Jeff Standley and Mark Engle.
[19] THE COURT: Good afternoon.
[20] MR. STANDLEY: Good afternoon,
[21] Your Honor.
[22] THE COURT: Good afternoon to you.
[23] All right. Ready to proceed.
[24] MR. CURTIN: Very well, Your

[1] Honor.
[2] Good afternoon, Your Honor. My
[3] name is Pete Curtin from Venable and I'm here on
[4] behalf of Simplification, the plaintiff in this
[5] case. If it is appropriate, Your Honor, I would
[6] like to hand up a copy of the slides I'll be
[7] showing here today. I have one for opposing
[8] counsel as well.
[9] THE COURT: Sure.
[10] MR. CURTIN: Your Honor, there are
[11] two patents at issue here in this case, and
[12] their full names and their numbers are set forth
[13] in the briefs in detail, but we call —the
[14] first patent is called the '052 patent.
[15] And the '052 patent discloses and
[16] claims a method and apparatus and a computer
[17] readable medium for something called automatic
[18] tax reporting.
[19] The second patent is the '787
[20] patent, and that's a continuation of the first,
[21] it has an identical specification amount and the
[22] '787 patent discloses and claims a method and
[23] apparatus and a computer readable medium for
[24] collecting tax data.

Page 5

[1] Like all patent cases, Your Honor,
[2] this case began with an idea and it was an idea
[3] that a lone inventor had back in 1996. That
[4] gentleman's name is David Miller and he's a tax
[5] attorney himself. And Mr. Miller was doing his
[6] taxes in 1996 using a commercially available tax
[7] preparation software when he had an idea. And
[8] the crux of this idea, Your Honor, was the
[9] realization that a substantial amount of the tax
[10] data you need to determine your tax liability
[11] existed electronically. So in that case, why
[12] should he have to enter it all in manually.
[13] His concept was why not reach out
[14] electronically to the tax data provider, connect
[15] electronically with that tax data provider, and
[16] retrieve tax data to the extent you could from
[17] that tax data provider electronically so that
[18] that tax data could be processed and used to
[19] help prepare an electronic tax return that then
[20] may or may not be filed electronically.
[21] Mr. Miller thought about that idea
[22] for a while, investigated, felt it had some
[23] merit, as far as he could ascertain, no one else
[24] was doing it in 1997.

Page 6

[1] Mr. Miller filed the original
[2] patent application in this case, and then he
[3] later founded Simplification LLC which is his
[4] own company, a one-man shop. And here we are
[5] today.
[6] Because the initial patent
[7] application was filed back in 1997, and that's
[8] eleven years ago, but that is a lifetime ago in
[9] the context of computers, technology and the
[10] speed with which that advances, because back in
[11] 1997, no one was out there with a product
[12] practicing this claimed invention. Today, there
[13] are a number of people who do.
[14] Now, there are thirteen terms that
[15] are in dispute, Your Honor, across the claims of
[16] the two patents. But in — I understand that
[17] the patents have already briefed these issues
[18] extensively and we have limited time before the
[19] Court today, so we're going to leave a lot of
[20] the minor issues, Simplification is going to
[21] leave a lot of the minor issues to the papers,
[22] although we're happy to take any questions the
[23] Court may have.
[24] My presentation is going to focus

Page 7

[1] on four major disputes between the parties, four
[2] core issues that if the Court resolves those
[3] four issues, it takes care of — it takes care
[4] of most of the claim construction.
[5] The first dispute, Your Honor, is
[6] the dispute over the meaning of the term
[7] automatic tax reporting. And particularly, the
[8] automatic piece of that.
[9] That term is contained in the
[10] preamble of all the claims of the '052 patent.
[11] And Block's proposed construction of automatic
[12] essentially would change that term to mean fully
[13] automated. And Simplification's response is no,
[14] those terms have different plain meanings,
[15] they're different and that is not what was
[16] claimed in the patent.
[17] The second major dispute, Your
[18] Honor, deals with the meaning of the term
[19] electronically, which is contained in all the
[20] claims of both patents. Block's proposed
[21] construction which essentially defines
[22] electronically to mean automatically, and to do
[23] that, they rely on excerpts of arguments taken
[24] from a hearing in the reexamination before the

[1] patent office. And those arguments are taken
[2] out of context, Your Honor, because
[3] Simplification's arguments regarding
[4] electronically were all made in the context of
[5] two claims in one of the patents. In fact, two
[6] limitations in Claims 1 and 10 of the '787
[7] patent and Block argues that that definition
[8] should be imported across all of the claims in
[9] both patents and that's inappropriate.
[10] Simplification says no,
[11] electronically means electronically, automatic
[12] means automatic and you shouldn't have a
[13] construction of electronic that renders
[14] automatic superfluous.
[15] The third core dispute has to do
[16] with the construction of the means plus function
[17] limitations because a number of the claims in
[18] both patents are within this means plus function
[19] format. I'm sure as the Court is aware to
[20] conclude a means plus function first you have to
[21] identify the function involved and then you have
[22] to identify the corresponding structure in the
[23] specification that performs that function.
[24] Now, Block's argument, Your Honor,
[1]

Page 9

[1] is that the Court cannot construe those claim
[2] terms because the specification does not
[3] disclose enough structure to support those claim
[4] limitations. And of course the upshot of that
[5] argument, Your Honor, is the patents would then
[6] be invalid or the patent claims would be
[7] invalid. Simplification says no, the
[8] specification discloses more than enough
[9] structure under the law to support those claim
[10] limitations and Block cannot meet its clear and
[11] convincing burden of proof to show otherwise.
[12] The fourth major dispute, Your
[13] Honor, focuses on the definition of electronic
[14] tax return which appears in the claims of the
[15] '052 patent. And that really centers on what
[16] exactly Block means by including the word
[17] completed in its proposed construction.
[18] So those are the four major issues
[19] my presentation is going to deal with today.
[20] And I'm going to address the first two issues,
[21] the construction of automatic tax reporting and
[22] electronically at the same time because as the
[23] Court will see, the arguments and issues
[24] overlap.
[N1]

Page 10

[1] With that, we'll move to the
[2] slides.
[3] There are four global problems,
[4] Your Honor, with Block's proposed claim
[5] constructions of automatic tax reporting and
[6] electronically. The first problem, Your Honor,
[7] is that their definition of automatic reads the
[8] term comprising out of the claims.
[9] As the Court is aware, comprising
[10] is a standard term of art in the patent world as
[11] a transitional term between the preamble and the
[12] body of the claim. All of these claims are
[13] written with the term comprising in it, but
[14] Block's construction of fully automated would
[15] eliminate comprising, it would render it a
[16] nullity. And they never adequately acknowledge
[17] and address that problem.
[18] The second global problem with
[19] Block's proposed construction is that they
[20] ignore the difference between fully automated
[21] and automatic. Those claims have different
[22] claim meaning both to individuals in ordinary
[23] life. They have different meanings to a person
[24] of ordinary skill in the art and as you'll see,

Page 11

[1] they have different meanings to the Federal
[2] Circuit.
[3] The third problem is the Block
[4] misuses the record of oral argument before the
[5] Board of Patent Appeals. For its construction
[6] of automatic and electronically, Your Honor,
[7] that is Block's case. It takes that transcript
[8] which was a thirty-five-page transcript, roughly
[9] forty-five minutes of oral argument where
[10] Simplification's counsel is sitting across the
[11] table from three administrative patent judges
[12] being peppered with questions, comes from three
[13] years of examination.
[14] As I highlighted in the
[15] introduction, they take some of those statements
[16] out of context. And it turns out, Your Honor,
[17] that transcript read as a whole in light of the
[18] whole record as it must be is a slender read and
[19] it cannot bear the weight that Block gives it.
[20] The fourth and final global
[21] problem of Block's construction is that they
[22] radically depart from the plain meaning of the
[23] terms. Automatic is not fully automated.
[24] Electronically is not automatic. And that
[1]

Page 12

[1] departure, Your Honor, is unjustified because
[2] there is not record support to overcome,
[3] sufficient to overcome the heavy presumption in
[4] favor of plain meaning.
[5] Next slide, please.
[6] To comprising point, Your Honor,
[7] first. All of the claims of the patents include
[8] the word comprising. And comprising has a clear
[9] and well-established legal effect. It means
[10] essentially including but not limited to. In
[11] other words, at least the following limitations
[12] must be performed, but there are perhaps more,
[13] other limitations are also possible. And the
[14] presence of other steps don't take the process
[15] outside the scope of the claim.
[16] The use of comprising in the
[17] preamble of these claims after automatic tax
[18] return —or automatic tax reporting, pardon me,
[19] expressly allows for additional intervening
[20] steps that are not recited and we see the
[21] Georgia-Pacific case for that and others in our
[22] briefs.
[23] Of course, then, as I said, this
[24] allows for additional steps which even if -Hawkins

Page 13

[1] even though all of the recited steps, and there
[2] may be a misunderstanding between Block and
[3] Simplification here, Your Honor, because as we
[4] have said in our briefs and as Dr. Sartori said
[5] to the patent office, if you recited steps in
[6] the claims of the '052 patent with automatic in
[7] them, it must be performed automatically. We
[8] acknowledge that.
[9] But the presence of the word
[10] comprising means there can be other steps which
[11] may or may not be automatic. It allows for the
[12] presence of some manual data entry. It allows
[13] you to circle back around in the process, get
[14] one piece of tax data, your W-2 data, for
[15] example, from the IRS and maybe you have to go
[16] contact the bank to get a 1099 form for
[17] dividends or your mortgage broker to get your
[18] 1098, you can go back and circle around and pull
[19] that information down and that's all within the
[20] steps of the process.
[21] And also if there is in the course
[22] of that some manual data entry, perhaps for
[23] example your mortgage broker or your charities
[24] aren't tied up to that program, they don't make

Page 14

[1] it available electronically for downloading, you
[2] do some manual data entry, the presence of those
[3] manual steps along with the electronic and
[4] automatically performed steps do not by them -5
do not take that process outside the scope of
6 the claims. And that's because of the presence
7 of the word comprising.

8 The Federal Circuit recognizes
9 this issue, Your Honor, in a case, and they
10 discuss this in a case that Simplification
11 actually cited to the Board of Patent Appeals at
12 the hearing that we're talking about. Here is a
13 quote from that case, this is CollegeNet versus
14 ApplyYourself, Inc. While Claim 1 does not
15 expressly provide for human intervention, the
16 use of comprising suggests that additional
17 unrecited elements are not excluded. Such
18 elements could include human actions to
19 expressly initiate the automatic storing or
20 inserting or to interrupt some functions.
21 I'll leave the detailed analysis
22 of that case to our briefs, Your Honor, but it's
23 important to note that the Federal Circuit in
24 CollegeNet rejected a proposed claim

Page 15

[1] construction for automatically that was put
[2] forward by the defendant. It's very similar to
[3] Block's proposed fully automated construction in
[4] that it would have precluded any manual
[5] intervention at any point in the process.
[6] And the Federal Circuit said no,
[7] that is not the plain meaning of automatic and
[8] also these are comprising claims.
[9] At the oral hearing,
[10] Simplification's counsel also explained the
[11] effect of comprising to the patent judges.
[12] Judge Moore said, "So you read these claims as
[13] excluding all manual data entries?"
[14] Mr. Sartori responds, "No, it
[15] doesn't for the fact that it is comprising, so
[16] it's open-ended. So you could perhaps enter
[17] other information automatically."
[18] And I have an SIC there, Your
[19] Honor, because as can happen sometimes in oral
[20] argument because he must have misspoken because
[21] that sentence only makes sense if instead of
[22] automatically it is manually. You can see that
[23] even more clearly when you consider what he said
[24] next. Next slide. When he goes on to further

Page 18

[1] explain.
[2] For example, let's say you gave
[3] some donations to Purple Heart last year in
[4] 2006. And Purple Heart, you know, isn't set up
[5] to do this electronic transmission. You would
[6] need to type up and enter your donations to go
[7] on your scheduled itemized deductions. That
[8] would be within the software, within the scope
[9] of the claim because it's comprising, but that
[10] would not actually meet the elements of the
[11] claims.
[12] So Simplification's counsel
[13] highlighted here exactly the point that I made
[14] to the Court, that manual entry of Purple Heart
[15] charitable contribution by itself doesn't meet
[16] the scope of the claims, it wouldn't, for
[17] example, infringe by itself but the presence of
[18] that manual entry doesn't take that tax return,
[19] that process outside the scope of the claims.
[20] Next slide, please.
[21] Moving on to the second point,
[22] Your Honor, Block's proposed constructions
[23] ignore the difference between fully automated
[24] and automatic. First, of course, there is the
[1]

Page 17

[1] core point that the language of the claims
[2] define the invention. And these claims recite
[3] automatic tax reporting, not fully automated tax
[4] reporting.
[5] Now, it's certainly true as
[6] Mr. Stanley is going to point out to you that
[7] the term fully automated appears in the patent,
[8] it appears in the title, it appears in the
[9] background section. It's mentioned a few times.
[10] But the claims state automatic and that we
[11] submit that is a conscious choice because fully
[12] automated is not automatic, unless they have
[13] different plain meanings.
[14] That is underscored by how Block
[15] chooses to distinguish the terms and also
[16] underscored by examples from real life.
[17] Automatic teller machines. Automatic
[18] dishwasher. An autopilot on airplane. All of
[19] those are examples of devices and processes
[20] where there is manual intervention both to
[21] initiate it and throughout, it can respond with
[22] prompts, you can interrupt the process.
[23] When you're dealing with your
[24] automatic teller machine, you're entering your

[1] password, you're responding to prompts, what do
[2] I want, here, there, give me my balance, give me
[3] my checking, give me my money. So you're
[4] manually intervening throughout, but at the same
[5] time everyone understands that is still an
[6] automatic machine, a processing going on there
[7] automatic even though it is not fully automated.
[8] And the dishwasher analogy, Your
[9] Honor, that is contained in the briefs, and I'll
[10] shorten that up for you to make a very basic
[11] point, that if you have a method claim for a
[12] method of automatically cleaning dishes after a
[13] dinner party, comprising, and you have to use
[14] the automatic dishwasher, you put in the dishes
[15] you wash them, et cetera, if you wash the dishes
[16] in an automatic dishwasher and you put those
[17] dishes in the sink but you have some wine
[18] glasses, they're fragile, you don't put them in
[19] the automatic dishwasher, you wash those in the
[20] sink by hand and put them away.
[21] You may have a frying pan that's
[22] crusted all over and you need to leave that soak
[23] overnight. The fact that you wash the frying
[24] pan and the wine glasses by hand does not mean

Page 19

[1] that you did not clean the other dishes
[2] automatically. And the presence of that manual
[3] washing of the wine glasses does not remove your
[4] clean up process from the scope of the
[5] comprising claim. That's a core point.
[6] The next slide, please. The
[7] Federal Circuit agrees, Your Honor, and they
[8] have interpreted automatically to mean, "Once
[9] initiated, the function is performed by a man,
[10] without the need for manually performing the
[11] function."
[12] And as you'll see, Your Honor,
[13] that parallel, that's almost exactly the
[14] proposed construction of automatic
[15] Simplification is offering in this case. And,
[16] again, that is the CollegeNet case which was
[17] cited to the board.
[18] Next slide, please. The third
[19] point, Your Honor, that is the board transcript
[20] does not truly support Block's position.
[21] Block's arguments for automatic tax reporting
[22] and for electronically ignore what I'll call the
[23] inherent imprecision of oral argument. By that
[24] I mean, Your Honor not that any word is
[1]

Page 20

[1] necessarily imprecise, but it's a process.
[2] People when you're speaking to
[3] each other, the judge and the counsel, there may
[4] be a question and answer, you're trying to
[5] understand each other. When someone is talking,
[6] you don't necessarily recite the full preamble
[7] in all the context of your statement the way you
[8] might do if you're an attorney crafting your
[9] brief, it's just a different process and
[10] sometimes in the course of oral argument people
[11] can get a little lost, get a little confused and
[12] it's hard to gauge the tenor of an oral record
[13] by the polled record, that's why it's important
[14] to read statements taken from an oral argument
[15] in context, in the context of the full hearing
[16] and to read that full hearing transcript in the
[17] context of the record as a whole.
[18] And Block's cites in support of
[19] their position, Your Honor, are either taken out
[20] of context with regarding to electronically or
[21] clarified or countered elsewhere in the
[22] transcript.
[23] The next side, please. The first
[24] point, Your Honor, is that every passage Block

Page 21

[1] cites about electronically refers to Claims 1
[2] and 10 of the '787 patent, and in particular it
[3] refers to two limitations of those claims,
[4] connecting electronically and collecting
[5] electronically.
[6] In those statements Simplification
[7] wasn't purporting to define electronically by
[8] itself and that's clear from a reading of the
[9] transcript as a whole. And even in its
[10] briefing, Your Honor, Block admits this context.
[11] Often in their brief they'll put
[12] in the brackets referring to Claims 1 and 10 of
[13] the '787 patent and sometimes it's expressed in
[14] the statements and yet they ignore that context.
[15] I'm going to give you a couple of
[16] examples here now and I'm sure Mr. Stanley is
[17] going to show you a number of other cites from
[18] the transcript in his presentation.
[19] Let's look at this one which comes
[20] from page 29 of the oral hearing and Block
[21] highlights this passage so much, they cited it
[22] two or three times in their brief. Here is part
[23] of it, in the '787 we have two independent
[24] Claims 1 and 10 which do not recite automatic.

Page 22

[1] We're focusing on Claims 1 and 10. And there
[2] are two reasons that I said previously that the
[3] Beamer article does not teach it, those claims.
[4] One is they're connecting electronically. And
[5] yes, we are saying electronically means that
[6] there's no manual input. You have to — we're
[7] saying you need to read it in light of the
[8] specification.
[9] Here is specific reference to the
[10] connecting electronically limitation in 1 and 10
[11] of the '787 patent. Next slide, please.
[12] Then going on on that page, Judge
[13] Lee says, Yeah, but why does that exclude any
[14] kind of manual input? I mean that's the crux of
[15] the issue. Yes, for Claims 1 and 10 of the '787
[16] patent. Because, Your Honor, that was the
[17] issue, these are the only two claims in the
[18] patent that did not — in the two patents that
[19] did not have the word automatic in them. The
[20] only two independent claims.
[21] And the issue that Simplification
[22] was going back and forth with the patent judges
[23] on were okay, we understand what you're saying
[24] about automatic, but in the absence of
[1]

Page 23

[1] automatic, how do these claims survive the prior
[2] art? And Simplification's response was that the
[3] connecting electronically and the collecting
[4] electronically steps must be performed
[5] automatically. It says you just say it does,
[6] but I don't get it. In the context of the step
[7] which refers to that recitation of collecting
[8] electronically refers to step 12 of the patent.
[9] Again, Claims 1 and 10 of the '787 patent,
[10] collecting electronically.
[11] Next slide.
[12] Now, Block argues that there is
[13] no — in its briefs that there is no reason to
[14] limit the scope of these statements to Claims 1
[15] and 10 of the '787 patent, but as I think I've
[16] already given you heads up, Your Honor, there
[17] are plenty of good reasons to do so. These are
[18] the only independent claims that do not include
[19] the term automatic, therefore, the focus of the
[20] discussion was how Claims 1 and 10 survived the
[21] prior art in the absence of automatic.
[22] They do not represent, therefore,
[23] a clear and unambiguous disavowal of the plain
[24] meaning of the term electronically itself which

Page 24

Page 26

[1] is what is required in the law to move beyond
[2] the plain meaning based on the prosecution
[3] history. And it certainly doesn't represent a
[4] clear and unambiguous disavowal of the plain
[5] meaning of electronically throughout all the
[6] claims of both patents.
[7] Next slide, please.
[8] Moving on to the automatic issue,
[9] Your Honor, for automatic tax reporting.
[10] Block's —the passages Block cites about
[11] automatic are clarified or countered by other
[12] passages in that same hearing record showing
[13] that automatic is given its plain meaning.
[14] Here is a quote from page 14 of
[15] that transcript. And automatic is not defined
[16] anywhere in the specification, so it must be
[17] given its ordinary meaning per the Phillips
[18] case.
[19] Next slide, please.
[20] It's also useful to understand,
[21] Your Honor, and you can see this from the
[22] transcript early on from that hearing,
[23] Simplification submitted about eight dictionary
[24] definitions of automatic and those dictionary
[25]

[1] definitions are all basically consistent and we
[2] presented a number of them in our briefs in
[3] support of our proposed claim construction, but
[4] the very fact that Simplification submitted
[5] eight dictionary definitions shows that they
[6] weren't trying to present any one special or
[7] unusual definition of automatic, they were just
[8] trying to show what the plain meaning of the
[9] term is.

[10] And Simplification also cited
[11] CollegeNet's definition of automatically as
[12] well. And we have discussed already, one
[13] initiated the function is performed by a machine
[14] without the need for the function to be
[15] performed manually. You see, that definition
[16] and the dictionary definitions and
[17] Simplification's proposed construction ties the
[18] automatically, draws the line at the beginning
[19] of each function. Once you initiate the
[20] function, that step must be performed
[21] automatically.
[22] Not some kind of —they don't
[23] draw the line anywhere else.
[24] Next slide, please.

[1]

[1] Therefore, Your Honor, there is -2
the transcript of the record of the board
3 hearing read as a whole shows there is no clear
4 and unambiguous disavowal of the claim scope or
5 of the plain meanings of the claim except as
6 noted, there is no clear and unambiguous
7 disavowal of automatic, there is no clear and
8 unambiguous disavowal of the term electronically
9 by itself and certainly not of the term
10 comprising.
11 And Block, Your Honor, in their
12 briefs, they acknowledge that there are
13 inconsistencies in this transcript as they must.
14 And at footnote six of their opening brief,
15 Block says yes, there are inconsistencies, but
16 it argues that the statements it cites about
17 automatically and electronically nullify the
18 statements about the comprising and the Purple
19 Heart example.
20 Well, Your Honor, that's just not
21 so. First of all, we submit you can minimize
22 the inconsistency by interpreting those passages
23 as Simplification urges by limiting the
24 arguments about electronically to Claims 1 and

27

1 10 of the '787 patent, two of those claim
[2] limitations, and by understanding that by
[3] talking about automatic, Simplification meant
[4] the plain meaning of automatic, not fully
[5] automated.
[6] But even if Block's interpretation
[7] of those passages is correct, Your Honor, and
[8] one set does nullify the other set, then what
[9] you have got is a wash, you have an ambiguous
[10] transcript that is not helpful for claim
[11] interpretation because the law is clear that an
[12] ambiguous prosecution history cannot limit the
[13] claims, it doesn't provide a basis to depart
[14] from the plain meaning of claim language.
[15] And for that we rely on the
[16] Athletic Alternatives case and the Inverness
[17] Medical cited in our briefs.
[18] In sum, Your Honor, this board
[19] hearing transcript is a prime example of the
[20] reason behind the caution the Federal Circuit
[21] issued about the use of the prosecution history
[22] in the Phillips case. And what the Federal
[23] Circuit said sitting on en banc, Because the
[24] prosecution history represents an ongoing

Page 28

Page 30

[1] negotiation between the PTO and the applicant,
[2] rather than the final product of the
[3] negotiation, which is the specification of the
[4] patent itself, it often lacks the clarity of the
[5] specification and thus is less useful for claim
[6] construction purposes.

[7] And here, Your Honor, we're
[8] dealing with a situation where at best, the best
[9] case scenario for Block is a situation where
[10] this hearing transcript in the reexamination
[11] history is ambiguous, it's a nullity, it's a
[12] wash. Certainly interpreting those passages as
[13] Block would have you do, certainly the
[14] transcript lacks clarity and therefore provides
[15] no basis to depart from the plain meaning of the
[16] claims.

[17] The fourth key point, Your Honor,
[18] is that Block's proposed construction radically
[19] departs from the plain meaning of the claim
[20] terms. Automatic is not fully automated.
[21] Electronically is not automatic. And Block's
[22] construction of electronically would render
[23] automatic superfluous. And we'll go on to show
[24] you why here.

[1] Next slide. It's also important
[2] to note that Block's proposed constructions
[3] ignore the specification of the patents.
[4] Block's constructions are inconsistent with the
[5] disclosure in the specification which as we'll
[6] show you distinguishes between automatic and
[7] fully automated in terms of the examples they
[8] disclose in the specification, and the treatment
[9] of electronically throughout the patent. And as
[10] you know, the law is clear that the
[11] specification is often regarded as the best
[12] guide for claim construction.
[13] Next slide. The specification
[14] never expressly defines automatic, therefore
[15] under the Phillips' case there is a heavy
[16] presumption that you employ the plain meaning of
[17] the term. However, the specification makes it
[18] clear that automatic tax reporting, that
[19] preamble term, need not be fully automated.
[20] They're not the same things.
[21] First of all, Your Honor, the
[22] patents acknowledge that not all tax data will
[23] be available electronically. We have got cites
[24] for that, for those two passages. And what it

[1] says there, Your Honor, is it talks about ---it
[2] mentions, it says substantially all tax data is
[3] available electronically. And it says later on
[4] that it's possible to eliminate virtually all
[5] copies of intermediate paper copies. There is
[6] nothing there that says all the tax data will or
[7] must be available electronically.
[8] Secondly, Your Honor, and I think
[9] even more significantly, the specification
[10] expressly notes that the processing and
[11] preparing steps can be implemented using current
[12] technology, the technology that was available in
[13] 1997. And, in fact, they cull out a specific
[14] example of that commercially available tax
[15] software, and the specification it calls out
[16] TurboTax as an example of the commercially
[17] available tax software that could implement the
[18] processing and preparing steps of the invention.
[19] And in Block's brief, opening
[20] brief, they concede that quote a standard tax
[21] program like TurboTax can perform the processing
[22] electronically step.
[23] Well, let's take a look at that,
[24] Your Honor. One thing that is absolutely clear,
[1]

Page 31

[1] and this is shown, it's both a matter of public
[2] record and a matter of fact, but it's shown from
[3] the screen shots from the 1997 version of
[4] TurboTax that we attached to your belief, that
[5] in 1997 TurboTax was an automatic program, it
[6] acted automatically, but it was not fully
[7] automated. TurboTax walked users through the
[8] preparation process giving them the option of
[9] using the easy step process or forms method.

[10] I'll show you now if I can figure out how to
[11] switch over to the Elmo, I'll try to make this a
[12] little more legible for the Court.

[13] This is a copy of one of the
[14] screen shots that we attached to our brief and
[15] I'll try to zoom in so we can read it. This is
[16] a screen shot from early in the program where
[17] they are describing to the taxpayer how it's
[18] going to work. And you see up there, Your
[19] Honor, it says easy step interview approach.
[20] Easy step interview guides you through your tax
[21] return. It asks you questions about your tax
[22] situation, enters your data on the proper tax
[23] forms, and offers relevant tax advice and
[24] suggestions.

[N1]

Page 32

[1] But here is an important point,
[2] Your Honor. It then says your calculations are
[3] automatically updated as you add or change data.
[4] So you see behind the scenes the computer
[5] program is automatically processing that data
[6] and automatically working in response to your
[7] prompt and responds to your information, but
[8] there is intervention to initiate each
[9] processing step.

[10] Under the forms method approach,
[11] Your Honor, again it says basically you're on
[12] your own, but it still has the taxpayer move
[13] from one form to —one tax form to the other,
[14] entering information in the fields that apply to
[15] their tax situation.
[16] Again, both of those steps require
[17] considerable manual intervention. And I'll try
[18] to get better with the Elmo for the next one.
[19] So therefore —next slide, please
[20] —Block's fully automated construction would
[21] exclude an example of the preferred embodiment
[22] set forth in the specification allowing for the
[23] use of 1997 technology similar to TurboTax for
[24] processing the said tax data and for preparing

Page 33

[1] electronically the tax return, the processing
[2] and preparing steps.
[3] And as you know, Your Honor, the
[4] law is clear that a claim construction that
[5] excludes the preferred embodiment quote is
[6] rarely if ever correct and requires highly
[7] persuasive evidentiary support. And they cite
[8] the Vitronics case for that one.
[9] Next slide, please. Moving on to
[10] electronically. There is no special meaning
[11] given to the term electronically in the patent
[12] specification. Therefore, of course, there is a
[13] presumption towards plain meaning. And, in
[14] fact, the specification taken as a whole makes
[15] it clear that electronic and electronically
[16] refer to states, states of being.
[17] And we spent two pages laying out
[18] those quotes in our opening brief and I'm not
[19] going to try to do it here for Your Honor, but
[20] we believe that is very clear from the
[21] specification. And, in fact, Block's proposed
[22] construction of electronic link and
[23] automatically is consistent with not only with
[24] the specification, but with the parties' agreed

Page 34

[1] upon claim constructions of the terms electronic
[2] link and electronic intermediary which the
[3] parties agree and the construction is made clear
[4] are simply electronic devices.
[5] Next slide. Simplification's
[6] constructions of automatic tax reporting and
[7] electronically by contrast comport with the
[8] plain meaning of the patents in the prosecution
[9] history. They acknowledge the presence of the
[10] word comprising in the claims, recognize the
[11] choice of the claim language automatic, and
[12] they're consistent with the hearing transcript
[13] taken as a whole.
[14] Next slide. Said specification
[15] does not define automatic. The plain meaning of
[16] automatic we submit is via a process in which
[17] one or more functions once initiated are
[18] completed without manual intervention. And the
[19] Court will recognize that from the CollegeNet
[20] case.
[21] Next slide. We also note that the
[22] plain meaning construction of automatic matches
[23] dictionary definitions which we submitted in our
[24] brief and we note that Block so far has
[1]

Page 35

[1] submitted none to the contrary, it mirrors the
[2] definition in the CollegeNet case which was
[3] presented to the patent office. And it gives
[4] the term comprising its full effect because it
[5] draws the automatic line at each step of the
[6] process. Each of the recited steps. Pardon me,
[7] let me clarify that. At each of the recited
[8] steps once initiated must proceed automatically.
[9] It still allows for the presence of other steps
[10] which may or may not be automatic.
[11] Next slide. Therefore, Your
[12] Honor, Simplification's proposed construction of
[13] automatic tax reporting is determining and/or
[14] reporting tax liability, or satisfying tax
[15] reporting obligations via a process in which one
[16] or more functions, once initiated, are completed
[17] without manual intervention.
[18] Next slide. Back to
[19] electronically. We submit the plain meaning of
[20] electronically is by way of devices, circuits or
[21] systems utilizing electronic devices.
[22] Next slide. This plain meaning
[23] construction of electronically is consistent
[24] with the specification in the way it treats

Page 36

Page 38

[1] electronically. It matches the dictionary
[2] definition, again, that we have submitted and it
[3] gives all of the claim language its full effect.
[4] It does not render automatic in the '052 patent
[5] claims superfluous and it's consistent with
[6] those agreed upon claim constructions for other
[7] terms that I pointed out to you.
[8] At this point, Your Honor, we'll
[9] move on to the third core dispute between the
[10] parties, the construction of the means plus
[11] function limitation.
[12] Next slide, please. Next slide.
[13] To construe a means plus function limitation,
[14] Your Honor, the Court must first define the
[15] function of that claim limitation, and then
[16] identify the corresponding structure in the
[17] specification to perform that function.
[18] The disputes between the parties
[19] over what exact function applies to these
[20] different limitations really hinges, Your Honor,
[21] on the construction of the term electronically,
[22] because all of these means plus function
[23] limitations have electronically in them. Means
[24] for connecting electronically, connecting

[1]

[1] collecting electronically, I'll skim over this
[2] corresponding structure that's identified in our
[3] brief. The corresponding structure identified
[4] in the specification includes a data processing
[5] system with a general purpose computer program
[6] with code segments to operate that computer
[7] causing it to connect electronically to
[8] establish a physical or logical coupling via an
[9] electronic link.

[10] And the specification also lists
[11] examples of electronic links, including a modem,
[12] a computer readable medium and an electronic
[13] data network.

[14] This structure, Your Honor, is
[15] sufficient to support the claimed limitation,
[16] means for connecting electronically.
[17] Next slide. It's also important
[18] to recognize, Your Honor, that structures and
[19] means for connecting two devices electronically
[20] were well-known in 1997. That's something you
[21] could almost take judicial notice of. The
[22] electronic data networks like the internet,
[23] there were modems, there were automatic teller
[24] machines that were networked. There is really

Page 37

Page 39

[1] electronically, preparing electronically, filing
[2] electronically, so you can see the functional
[3] issues hinge on the construction of
[4] electronically. So we're not going to go back
[5] over that, we'll rely on our briefs and to my
[6] prior argument.
[7] However, the structural issues,
[8] that's what we need to focus on, because Block
[9] argues that the Court cannot construe the means
[10] plus function limitation because there is not
[11] sufficient structure disclosed in the
[12] specification. And the upshot of that is the
[13] patent claims would be invalid.
[14] However, these claims are presumed
[15] valid under 35 USC, and, therefore, Block has
[16] the burden of proof on this issue by clear and
[17] convincing evidence if it is arguing to the
[18] Court that there is insufficient structure in
[19] the patents to support these claim limitations,
[20] they must show it by clear and convincing
[21] evidence. And that's the Budde versus
[22] Harley-Davidson case, Federal Circuit 2001.
[23] Next slide, please.
[24] Specifically, the means for

[N1]

[1] no dispute, people of ordinary skill in the art
[2] understood how to connect devices electronically
[3] eleven years ago.
[4] And the law is also clear, Your
[5] Honor, this is an important point, because a
[6] detailed description of structure is unnecessary
[7] when the structure to perform the claimed
[8] function is well-known in the prior art, or
[9] well-known in the art. And that's the S3 versus
[10] nVidia case. And I'm going to read the quote
[11] actually from that case, Your Honor. The law is
[12] clear, the patent document need not include
[13] subject matter that is known in the field of the
[14] invention and is in the prior art. The patents
[15] are written for persons experienced in the field
[16] of the invention, told otherwise would require
[17] every patent document to include a technical
[18] treatise beyond the skilled reader. And that's
[19] not the law, Your Honor.
[20] Next slide, please. However, to
[21] address a point that Block first raised in its
[22] opposition brief, Your Honor, Block raises in
[23] its opposition brief the idea that the means for
[24] connecting electronically and collecting

[1]

Page 40

[1] electronically do not satisfy the requirements
[2] under the Aristocrat Technologies and the Harris
[3] case because it's a computer implemented
[4] invention using software and they don't set
[5] forth an algorithm.
[6] Well, Your Honor, to assess that
[7] argument it's critical to understand what an
[8] algorithm is. It's not source code. You don't
[9] have to write out your whole computer program
[10] and put it in a patent. Instead, under the law
[11] an algorithm is simply a step wise description
[12] of the process you would use to perform that
[13] function. And it doesn't have to be every
[14] single little step, but it has to be a
[15] sufficient description of a step wise process to
[16] show a person of ordinary skill in the art how
[17] you intend to perform —it gives structure for
[18] how you're supposed to perform the claimed
[19] function. That's why, for example, block
[20] diagrams with arrows and circles and boxes can
[21] be sufficient structure to support a means plus
[22] function claim.
[23] The means for connecting
[24] electronically is supported by sufficient
[NN1]

Page 41

[1] structure, and because it discloses steps for
[2] connecting electronically. And I will point
[3] Your Honor to those steps in the patent. It
[4] begins in column four of the patent and goes
[5] down to column five lines 65 and it's a
[6] discussion of steps 11 and 12.
[7] Step 12, let's get this over to
[8] the Elmo here. And this is towards the bottom
[9] of column five, Your Honor, discussing step 12,
[10] which I believe the parties agree includes both
[11] the connecting electronically and collecting
[12] electronically parts of the process.
[13] In step 12, the electronic
[14] intermediary electronically collects tax data
[15] from the tax data providers using electronic
[16] links. And it goes on to describe how that
[17] happens.
[18] At the bottom of the paragraph it
[19] says Figure 2 is illustrative and the electronic
[20] intermediary 21 can connect electronically with
[21] and collect tax data electronically from, see
[22] both step connecting and collecting, from other
[23] tax data providers as discussed above in step
[24] 11.
[NN1]

Page 42

[1] So let's see what they say about
[2] that in step 11. It refers back, and by doing
[3] this, Your Honor, it specifically refers to and
[4] identifies the process of step 11 as being a
[5] piece of the algorithm you use to accomplish
[6] step 12, connecting and collecting
[7] electronically.
[8] And, Your Honor, starting —let
[9] me go a little higher up. In step 11 this is
[10] from column four of the patent, in step 11 the
[11] taxpayer 20 provides the electronic intermediary
[12] 21 with information on tax data providers.
[13] Going down the column a bit. The
[14] information provided by the taxpayer to the
[15] electronic intermediary may include
[16] identification, that's personal identifying
[17] information such as a Social Security number.
[18] Also alternatively, the taxpayer
[19] could specifically identify the tax data
[20] providers and could include information on how
[21] to contact tax data providers electronically.
[22] Additionally, the taxpayer can
[23] provide the electronic intermediary with
[24] authorization to contact and receive information

[1] from the tax data providers. That's the link to
[2] step 12 there, connecting and collecting.
[3] In sum, Your Honor, let's look and
[4] see what's been disclosed here. The taxpayer
[5] provides identifying information to the
[6] electronic intermediary, and that can be an
[7] identifying information about themselves,
[8] identification of the tax data providers,
[9] account numbers, et cetera.

[10] The electronic intermediary takes
[11] that information, reaches out and contacts the
[12] tax data provider and connects with the tax data
[13] provider. And those, Your Honor, are steps, the
[14] steps disclosed in the patent, the algorithm for
[15] performing the connecting electronically step,
[16] and that provides under the law and under the
[17] standards of Aristocrat and Harris, the
[18] algorithm that's required, the structure that's
[19] required to support the means plus function
[20] limitation.

[21] And that's particularly true
[22] because you have to consider that in the context
[23] of all the physical structures disclosed and the
[24] fact that this was well-known in the art how to

[1] do these things.
[2] Means for collecting
[3] electronically. Again, Your Honor, we have a
[4] similar structure here, data processing system,
[5] general purpose computer, program of code
[6] segments, causing it to gather tax data by an
[7] electronic link. We're back up at step 12, and
[8] the specification lists examples of electronic
[9] links including a modem, a computer readable
[10] medium and an electronic data network.
[11] Next slide. And that, Your Honor,
[12] is sufficient structure to support the means for
[13] collecting electronically limitation of the
[14] patents. Particularly when you consider that
[15] structures and means for collecting data
[16] electronically were well-known in 1997, and an
[17] example that resonates in the legal community,
[18] Your Honor, is Westlaw and Lexis, these are data
[19] services that were available back in 1997, and
[20] you reach out from your computer, your
[21] electronic intermediary to a main server, you
[22] look for data, you connect with them, you look
[23] for data, you grab data and download cases and
[24] retrieve them back. This gives a legal point

[1] that a detail description of structure is not
[2] necessary when the structure to perform that
[3] function is well-known in the art.
[4] Next slide. Similarly, Your
[5] Honor, as noted before and given a very similar
[6] to what I have shown you already on the Elmo
[7] with columns four and five of the patent, the
[8] specification discloses steps for collecting
[9] electronically. And that provides in any
[10] algorithm that Block requires be required under
[11] Aristocrat and Harris.
[12] In this case, for this step it's
[13] the taxpayer provides identifying information as
[14] I have discussed, the electronic intermediary
[15] contacts and connects with the tax data
[16] provider, the electronic intermediary collects
[17] tax data from the tax data provider and pulls it
[18] back. That's the step wise process, a step wise
[19] description of a process used to perform the
[20] claimed function. And that tells a person of
[21] skill in the art what they're supposed to do.
[22] That provides the structure required to support
[23] this claim limitation.
[24] Next slide, please. Moving on to

[1] means for processing electronically. Again, we
[2] have got the corresponding structure identified
[3] there, data processing system with a computer
[4] program with code segments causing it to perform
[5] such systematic operations to do the processing.
[6] Importantly here, Your Honor, the
[7] patent specifically discloses that the
[8] processing step could be performed by 1997 tax
[9] preparation software similar to TurboTax. We
[10] have got a cite for that.
[11] So the specification has culled
[12] out not only that commercially available
[13] products can do this processing, but it's
[14] identified one, TurboTax.
[15] Next slide. This is significant,
[16] Your Honor, because a specific reference to a
[17] commercially available product as an example of
[18] corresponding structure is sufficient to
[19] overcome a claim of indefiniteness. And that's
[20] black letter law. And we cite Budde versus
[21] Harley-Davidson for that, which in that case
[22] Your Honor, one of the means plus function
[23] limitations involved was a sensing means. It
[24] was a case involving fuel injectors for

[1] motorcycle engines. And it was a sensing means.
[2] And the patent specification
[3] referred to as commercially available vacuum
[4] sensor. They said that's fine, because that
[5] tells a person of ordinary skill in the art what
[6] you use to perform that function.
[7] Here this patent is identified
[8] commercially available tax preparation software
[9] similar to TurboTax, so one of skill in the art
[10] knows what to look for.
[11] And also the Radio Systems case,
[12] Your Honor, in which the specification noted
[13] that circuitry for starting and stopping signals
[14] was commercially available. And that was
[15] sufficient disclosure to support a means plus
[16] function limitation for that.
[17] Moving on to preparing
[18] electronically, Your Honor, means for preparing
[19] electronically, the argument there is
[20] essentially the same. You have a data
[21] processing system with a computer and code
[22] segments to operate it which prepares an
[23] electronic tax return. But again, the patent
[24] discloses the preparing step could be performed

Page 48

[1] by 1997 tax preparation software similar to
[2] TurboTax. And again, we point to the Budde case
[3] and the Radio Systems case. That specific
[4] reference to commercially available products
[5] defeats Block's argument that there is
[6] insufficient structure to support that step.
[7] The last means plus function
[8] limitation, same slide, is means for filing
[9] electronically. There, Your Honor, we have
[10] corresponding structure of course being the
[11] general purpose computer program with code
[12] segments to operate it causing it to submit an
[13] electronic tax return to a taxing authority
[14] through an electronic link.
[15] We have talked about examples of
[16] the electronic link. And here the patent also
[17] discloses, Your Honor, that electronic filing
[18] with the IRS was available in 1997. And also
[19] I'll point out it also identifies commercially
[20] available tax preparation software such as
[21] TurboTax which could, in fact, perform the type
[22] of E-filing.
[23] The next slide. Your Honor, the
[24] specific reference, and we'll go back to the

Page 49

[1] Budde case and Radio Systems case and say look,
[2] the specific reference to the fact the IRS
[3] E-filing tax system was available on the market,
[4] because it wasn't commercially available because
[5] the IRS wasn't charging people, people weren't
[6] buying it, but they were using it and it was out
[7] there. And the patent points to it as an
[8] example of how E-filing was done. And that is
[9] sufficient structure to defeat a claim of
[10] indefiniteness because it tells a person of
[11] ordinary art what structure gets the job done.
[12] Next slide please. The next and
[13] final major contention between the parties, Your
[14] Honor, is the electronic tax return. Next
[15] slide.
[16] Simplification's proposed
[17] construction of electronic tax return, Your
[18] Honor, is a statement of tax liability or tax
[19] related information in a form prescribed by a
[20] taxing authority in an electronic format.
[21] Block's proposed construction is a
[22] completed computerized tax return ready for
[23] submission to a governmental taxing agency.
[24] There are a couple of issues with

[1] that, Your Honor. First of all, it is not clear
[2] to us exactly what Blocks means by a computer,
[3] secondly when they say completed, that raises a
[4] lot of questions, Your Honor. What do they mean
[5] by completed? Do they mean it has to be signed?
[6] Do they mean it needs an electronic signature?
[7] Do they need mean there can be no manual
[8] intervention at the point of filing because that
[9] is certainly what their proposed constructions
[10] of preparing and filing electronically suggest.
[11] And those are dealt with in the briefs. But if
[12] that's the issue, if that's what Block means by
[13] completed, then Block is wrong.
[14] Next slide. An electronic tax
[15] return because the specification expressly notes
[16] that you could prepare an electronic tax return
[17] using circa 1997 tax preparation software. And
[18] back in 1997, Your Honor, and you can see this
[19] in the screen shots that we attached to our
[20] brief, commercially available tax preparation
[21] software like TurboTax had the capacity to
[22] electronically file with the IRS. But when
[23] people were E-filing federal tax returns back
[24] then, the IRS didn't accept an electronic
[1]

Page 51

[1] signature. The taxpayer had to after you hit
[2] the button to send your tax return in, Your
[3] Honor, taxpayers had to print out an IRS form,
[4] 8453-OL, you to had fill out that form putting
[5] in a control number that you got back from the
[6] Internal Revenue Service, you had to sign that
[7] form and submit it to the IRS and the IRS did
[8] not consider that tax form complete until they
[9] received the signed form.
[10] So in sum, Simplification says the
[11] correct construction of the claim term
[12] electronic tax return cannot require preparation
[13] or completion beyond what could be done in 1997.
[14] Back to the beginning, please. In
[15] conclusion, Your Honor, Block's proposed claim
[16] constructions must fail for a number of reasons
[17] that I have pointed out to you. Particularly,
[18] Your Honor, they must fail because the
[19] transcript of the hearing before the Board of
[20] Patent Appeals simply does not show what Block
[21] says it shows.
[22] Those passages do not mean what
[23] Block says they mean. As I said, they're either
[24] taken out of context with regard to
[N1]

Page 52

[1] electronically or they're countered by others
[2] which show that Simplification was just arguing
[3] for the plain meaning of automatic, not for
[4] fully automated.
[5] Secondly, Your Honor, the record
[6] as a whole supports Simplification's proposed
[7] constructions. By that I mean the hearing
[8] transcript read as a whole, the hearing
[9] transcript read in light of the re-examination
[10] history and the file history and the
[11] specification and the plain language of the
[12] patent.
[13] Third, as regards to a means plus
[14] function limitation, there is sufficient
[15] structure disclosed in the specification to
[16] support those limitations. There are
[17] algorithms. There are commercially available
[18] products disclosed. And Block cannot meet its
[19] clear and convincing burden of proof to show
[20] otherwise.
[21] And finally, the electronic tax
[22] return, that construction cannot require more
[23] than what was possible to do in 1997.
[24] Thank you very much for your time,

[1] Your Honor. At this point I'll reserve my
[2] remaining time for any rebuttal.
[3] **THE COURT:** Thank you. We'll have
[4] a short recess before we have you present.
[5] (A brief recess was taken.)
[6] **THE COURT:** All right. Be seated.
[7] Ready to proceed?
[8] **MR. STANDLEY:** Your Honor, my name
[9] is Jeff Standley. I'm here on behalf of the
[10] defendants today. Along with me, Mark Engle and
[11] Karen Pascale. It's our pleasure to be here.
[12] Your Honor, we have a slide
[13] presentation we would like to present and if it
[14] meets with your approval, I would like to give a
[15] copy to the Court and to opposing counsel.
[16] **THE COURT:** Yes. Thank you.
[17] **MR. STANDLEY:** It's only thick,
[18] Your Honor, because we have — we put the
[19] exhibits in the back. The presentation I assure
[20] you is not that long.
[21] **THE COURT:** All right.
[22] **MR. STANDLEY:** All right. Your
[23] Honor, we'll begin with our first slide. Your
[24] Honor, we thought that it would benefit the

Page 54

[1] Court to understand a little bit about the
[2] evolution of tax preparation and how it has come
[3] along in past years.
[4] Originally tax returns were
[5] completed by hand. We're all familiar with
[6] this, sitting around the kitchen table filling
[7] these things out.
[8] Then the process progressed
[9] somewhat. And you had tax preparation companies
[10] like H & R Block that assisted people with their
[11] tax returns using a computer.
[12] The next one is, the next
[13] progression was tax returns prepared on your
[14] home computer. The data was still manually
[15] entered with your own fingertips through the
[16] keyboard and the computer would perform the
[17] calculations and generate a completed return
[18] ready for submission to the IRS.
[19] The next step in the evolution was
[20] tax returns were prepared on a computer at home,
[21] data was manually entered, the computer
[22] performed the calculations and generated a
[23] completed return. Instead of mailing, the tax
[24] return was then capable of being transmitted

Page 55

[1] online to the IRS through something known as
[2] electronic filing.
[3] More recently, we have been able
[4] to import data from banks, companies such as
[5] that into personal financial software which
[6] could be imported into the tax return software
[7] to generate a return.
[8] And this gets into the so-called
[9] Beamer references, which the patent office
[10] relied upon in the reexamination to reject the
[11] claims of the Simplification patents.
[12] I will say that the Beamer
[13] references did involve some manual pointing and
[14] clicking, so there was some manual work that had
[15] to be done with those.
[16] The patent itself, Your Honor,
[17] refers to increasing levels of automation in tax
[18] preparation. At column one it refers to an
[19] increasing amount of data necessary to compute
[20] income tax liability and that data was
[21] increasingly becoming available electronically.
[22] In column one, lines 39 to 49, it
[23] refers to how tax return preparation had become
[24] increasingly automated. Mentioned the TurboTax

Page 56

[1] program which we've heard about today.
[2] Also in column one at lines 50 to
[3] 63, there are a few legal interpretational
[4] issues with regard to determining tax liability
[5] for most taxpayers. In other words, I think
[6] what this is driving at is many taxpayers in the
[7] country do not have complex tax returns.
[8] Finally, taxing authorities such
[9] as the IRS have begun accepting electronic
[10] returns and that's also mentioned in column one
[11] of the patent.
[12] It's very important in the context
[13] of this case that we have an appreciation for
[14] what was this invention supposed to do. And I
[15] think that's highlighted in several places, five
[16] or six to be exact, in both patents, each
[17] patent. It's highlighted by the description
[18] that is fully automated, and right there in
[19] column two are a couple of instances out of the
[20] patent where it refers to this invention being
[21] fully automated, talking about how historically
[22] fully automated tax prep was not available.
[23] It is also interesting that the
[24] title of the patent is fully automated. There

Page 57

[1] is several references to being fully automated.
[2] I think what is probably more
[3] important is that aside from the manual entry of
[4] initiating the software that's described in step
[5] 11, which we're going to get into in the patent
[6] in a few moments, aside from that initiation,
[7] the initial step, the patent is silent as to any
[8] other manual initiation going on. I think
[9] that's another indication, in other words, what
[10] isn't said is another indication of the fact
[11] that this is a fully automated system.
[12] In column three in the summary of
[13] the invention, another reference to what the
[14] invention is. It's the object and advantages of
[15] the present invention are achieved by a method,
[16] an apparatus, and an article of manufacture for
[17] fully-automated reporting of tax refund.
[18] And then here is a figure taken
[19] out of the patent, and this is Figure 1, and it
[20] just goes through the procedures that are in
[21] this patent.
[22] Before I get too deep into this,
[23] Your Honor, I want to point out that if you take
[24] a look at these patents, I know you have, there

Page 58

[1] are two figures. I don't know about you, but I
[2] refer to these figures as stick figures. There
[3] is no meat on these bones. They're a skeleton.
[4] You can see the general idea of what the
[5] inventor had in mind, but you don't see any
[6] substance there.
[7] And this is going to be a
[8] continuing problem as we get further into -9
[9] especially into the means plus function claims.
10 But this is about as detailed as it gets.
11 What troubles Block about this

12 sort of a drawing is that Block above probably
13 all others in the world knows the complexities
14 of what is involved in tax prep and collecting
15 of tax data. And it's an extremely complicated
16 process. And we truly question whether the
17 inventor in this situation grasp that.
18 But anyway, during the initiation
19 procedure, step 11 is the only step that's
20 mentioned in the patent where the user manually
21 inputs information. And just very quickly, what
22 is that information they're manually inputting?
23 This is setup information, Your Honor. This is
24 your name, your address, maybe where you bank.

Page 59

[1] Maybe the name of your employer, where we can
[2] get your W-2. Maybe the account number of the
[3] bank or something like that where this data
[4] could be automatically obtained.
[5] And then it goes through the
[6] various steps. Step 12, the electronic
[7] intermediary is described as data processing
[8] system comprising a general purpose computer and
[9] a computer program. Electronically collects the
[10] tax data from each tax data provider that has
[11] tax data pertaining to the taxpayer using the
[12] electronic links.
[13] It may sound apparent from what
[14] we're talking about. What we're highlighting
[15] there is there isn't any mention from steps 12
[16] down to step 15, there is no mention in this
[17] patent of anything being done manually. Once
[18] you get the initiation setup started, from there
[19] you go out and you collect the data
[20] automatically, it's imported automatically.
[21] And here is the other stick figure
[22] or drawing that's in the patent, and links 32,
[23] 33, 34, 35, 36 and 37 shown in those drawings
[24] are all culled out in the patent as electronic

Page 62

[1] links.
[2] There is no detail of how those
[3] electronic links are set up. You're just told
[4] that they're there. And then you have these
[5] blocks out on each end where the person is to
[6] get —excuse me, the electronic intermediary is
[7] to get the data.
[8] With the electronic collection of
[9] tax data in step 12, this is taken right out of
[10] the patent, column six, lines 23 to 27, the
[11] invention I'm quoting eliminates the current
[12] requirement that a taxpayer manually collect the
[13] tax data, eliminates the current requirement
[14] that a taxpayer manually enter such tax data
[15] onto a tax return or into a computer. I think
[16] eliminates is a strong word.
[17] Step 13. The electronic
[18] intermediary processes the tax data obtained
[19] electronically from the tax data providers in
[20] step 12. The information processed in step 13
[21] is obtained in the steps 11 and 12, this is
[22] referred to in column six of the patent.
[23] And then finally step 14, the
[24] electronic intermediary, perhaps the electronic

[1] Docking Station versus Dell case.
[2] Your Honor, earlier today
[3] Mr. Curtin referred to the context of the oral
[4] hearing in Washington. And he said that Block
[5] had taken things out of context.
[6] There are two things about the
[7] context that we want the Court to see. The
[8] first thing about the context is the entire
[9] structure of the patent being fully automated.
[10] It's all over this patent saying it's fully
[11] automated. In that context we haven't gotten it
[12] wrong, we haven't taken it —but at that board
[13] hearing, the context was this, the reexamination
[14] authority at the patent office had stricken both
[15] patents, both patents were dead, they were gone.
[16] The context of that hearing was
[17] Simplification was fighting for its life, its
[18] patent life. Had the board not seen it
[19] Simplification's way, these patents would be
[20] dead and invalid and not in existence today.
[21] That's the context of that board hearing and
[22] that's why we think that board hearing was so
[23] crucial.
[24] There were some statements made up

Page 61

[1] tax returns using the processed tax data from
[2] step 13. The reason we highlighted processed
[3] tax data is we think it's clear that processed
[4] tax data comes from the prior step which is
[5] again an automatic fully electronic step.
[6] In the first patent, you have the
[7] fact that you can file the electronic tax return
[8] in step 15, the second patent doesn't include
[9] that in the independent claims, the first patent
[10] does.
[11] Read in light of specification,
[12] the invention is a fully automated system. The
[13] title of the parent patent recites fully
[14] automated. The summary of the invention says
[15] the invention is fully automated. None of the
[16] embodiments disclose any manual input from step
[17] 12 on through the process of the patent. And
[18] the prosecution history supports a fully
[19] automated invention.
[20] The patent claims should not be
[21] construed one way in order to obtain their
[22] allowance and in a different way against accused
[23] infringers. And this is a case that I'm sure
[24] the Court is very familiar with, the Computer

Page 63

[1] at the beginning of the board hearing where you
[2] see this going on between the inventor, the
[3] inventor's attorney and the board, and as you
[4] see that negotiation heating up in the
[5] transcript, you start to get further toward the
[6] end and you see where the inventor made
[7] statements that through his attorney that he had
[8] to make in order to defeat the prior art and get
[9] this thing back into issuance and out of the way
[10] of the prior art.
[11] So the history of the
[12] reexamination on April 8, 2003, Simplification
[13] sues Block for patent infringement of the '052
[14] patent. On July 11, '03, Block requested
[15] reexamination of the '052 patent. In October of
[16] '03, the reexamination was granted on the '052
[17] patent. And then in February of 2004, the
[18] continuation patent, that is the also the
[19] subject of this case, it issued at the patent
[20] office.
[21] On February 24, 2004,
[22] Simplification sues Block on that continuation
[23] '787 patent. On March 15, 2004, Block requests
[24] a reexamination of the '787 patent. And in June
[1]

Page 64

[1] of 2004, the reexamination was granted, the
[2] request was granted on the '787 patent.
[3] In June of '05, the examiner
[4] issues a final rejection for all asserted claims
[5] of the '052 patent. So the reexamination had
[6] wound its way through, it took some time, final
[7] rejection was issued.
[8] In January of '06, the examiner
[9] issued a final rejection of all asserted claims
[10] of the continuation patent.
[11] And the primary basis for the
[12] prior art rejections was the Beamer reference,
[13] which you'll hear more about here momentarily.
[14] So in the Beamer reference, which
[15] by the way, Your Honor, predated the application
[16] by Simplification of some ten years, we've
[17] highlighted a section there out of the Beamer
[18] reference and I quote, one day in the not too
[19] distant future, Jan and Jim Smithwick will have
[20] their employers transmit their salaries
[21] electronically directly into their personal bank
[22] accounts. They will be able to download their
[23] bank records into their personal financial
[24] software. That program can —it says lie —I
[N1]

Page 65

[1] think it meant then pass the information to a
[2] tax preparation program. Jan and Jim will then
[3] send the electronic version of their tax return
[4] to their accountant via modem and the accountant
[5] can electronically file the tax return with the
[6] IRS. All of this will be accomplished without
[7] the Smithwick's having to re-enter any data,
[8] without the use of a pocket calculator and
[9] without the necessity of any paper.
[10] I think what's important here is
[11] this is ten year before Simplification's patent
[12] filing. And even when Simplification comes out
[13] with their filing ten years later, there is no
[14] meat on those bones. You still have just the
[15] skeleton figures, the Figure 1 and 2, not much
[16] more than you see right here in this Beamer
[17] reference.
[18] Also in the Beamer reference, I
[19] quote, MoneyLine allows you to communicate
[20] directly with your bank's computer system. Many
[21] transactions can be directly fed by the bank's
[22] computer into Dollar & Sense accounts, capital
[23] D, capital S. This reduces the drudgery of
[24] retyping data, increases accuracy and gives

Page 66

[1] convenient access to bank information at any
[2] time, not just when the statement arrives. This
[3] is a powerful example of how easily information
[4] can be transferred between dissimilar computers,
[5] let alone dissimilar programs.
[6] So with that background, the
[7] examiner in the reexamination proceeding said in
[8] an office action dated January 18, 2006, at page
[9] 15, and I quote, "The tax preparation software,
[10] e.g., MacInTax, can electronically connect to
[11] and download relevant financial information from
[12] a bank via a home accounting program, e.g.,
[13] Dollars & Sense. This downloaded information is
[14] used to assist in completing one's tax return.
[15] Use of software executed by a computer to
[16] perform tax computations for preparing a tax
[17] return is indicative of electronic and automatic
[18] performance of these computations. In other
[19] words, a computer is an electronic device that
[20] automates such computations as opposed to
[21] performing the calculations completely manually
[22] by a human."
[23] Simplification responded on
[24] November 30, 2005 at their appeal brief for the

Page 67

[1] '052 patent and on August 22, 2006, their appeal
[2] brief was filed for the '787 patent. On May 7,
[3] 2007, the oral hearing on both asserted patents
[4] was conducted before the Board of Patent Appeals
[5] and Interferences.
[6] Your Honor, at this point,
[7] although I'm sure the Court is well aware, we
[8] think it's important for the record to put in a
[9] little bit of law on the issue of prosecution
[10] disclaimer. The Purdue Pharma versus Endo
[11] Pharms case, a patentee may limit the meaning of
[12] a claim term by making a clear and unmistakable
[13] disavowal of scope during the prosecution.
[14] And then the Dell case we
[15] mentioned earlier. I quote, "A patentee could
[16] do so, for example, by clearly characterizing
[17] the invention in a way to try to overcome
[18] rejections based on prior art."
[19] And then we have the Omega
[20] Engineering versus Raytek case. And I quote,
[21] "As a basic principle of claim interpretation,
[22] prosecution disclaimer promotes the public
[23] notice function of the intrinsic evidence and
[24] protects the public's reliance on definitive

Page 68

[1] statements made during prosecution."
[2] So prosecution disclaimer does not
[3] depend on whether an applicant distinguishes
[4] their invention in multiple ways. A disavowal
[5] if clear and unambiguous can lie in a single
[6] distinction among many. And for that you can
[7] see the Andersen versus Fiber Composites.
[8] Also in Norian versus Stryker,
[9] there is a quote, "We have not allowed patentees
[10] to assert that claims should be interpreted as
[11] if they had surrendered only what they had to."
[12] In the Laitram versus Morehouse
[13] case, Moreover, the fact that the USPTO does not
[14] rely on the distinction does not erase an
[15] applicant's clear disavowal of the claim scope
[16] taken out of that case.
[17] Simplification asserts that
[18] collecting electronically requires no manual
[19] input in its appeal briefs. This is a section
[20] taken out of their appeals brief where they're
[21] talking about the Beamer reference. And I
[22] quote. "To move the data from the text file
[23] into the locations on the MacInTax electronic
[24] tax form, Beamer teaches that the taxpayer must

9 Beamer —excuse me, there is a
10 reference to Beamer, and then it continues, all
11 of this manual input, again, manual input is
12 underlined, must be done by the taxpayer prior
13 to the MacInTax software performing any tax
14 computations for preparing a tax return.
15 Hence, Beamer fails to teach that
16 tax data collected electronically is not
17 manually entered onto the electronic tax return
18 and into the taxpayer's computer. Thus, Beamer
19 fails to teach "means for collecting
20 electronically tax data from said tax data
21 provider", and/or the method step of "collecting
22 electronically tax data from said tax data from
23 said tax data provider."
24 And that ends our quote from that

[18]

Page 69

[1] manually select the data —and they underline
[2] the words "manually select" —continuing —the
[3] data from the Dollars & Sense year-end financial
[4] report (which was converted into ASCII text by
[5] the MacInTax Converter) and manually point -6
again, the "manually point" are in bold and
7 underlined —to where the data should be
8 entered on the MacInTax electronic tax form.

[1] appeals brief.
[2] So a representative claim taken
[3] out of the '787 patent is Claim 10 and you can
[4] see where we've highlighted connecting
[5] electronically in the first claim element. In
[6] the next claim element, go ahead, again, taking
[7] their comments made in the reply brief, they
[8] once again say that Beamer fails to teach or
[9] suggest collecting electronically tax data from
[10] the tax data provider.
[11] I'm quoting from Simplification's
[12] '787 reply brief. "The automatic step of/means
[13] for collecting electronically tax data from said
[14] tax data provider."
[15] And then down below it refers to,
[16] Beamer, however, teaches that manual input -17
and once again, it's underlined —manual input
18 must be done by the taxpayer prior to the
19 MacInTax software performing any tax

20 computations for preparing a tax return, which
21 is distinguishable from the automatic step
22 recited in the claims.
23 So, therefore, collecting
24 electronically, that step is automatic in our

Page 71

[1] view and must be performed without manual input.
[2] This was argued even as to Claims 1 and 10 of
[3] the '787 patent, claims that do not recite the
[4] term automatic anywhere.
[5] At the oral hearing in
[6] distinguishing its invention over the prior art
[7] of record, Simplification made two key
[8] admissions. One, that electronically equals no
[9] manual input. And two, after step 11, if there
[10] is any manual input, it's not covered by the
[11] claims and it does not anticipate the claims.
[12] Simplification specifically
[13] disclaimed any manual input for the term
[14] electronically at the hearing. Mr. Sartori was
[15] asked, or excuse me, commented, and I quote,
[16] "And there are two reasons that I said
[17] previously that the Beamer article does not
[18] teach it. One is they're connecting
[19] electronically. And yes, we are saying
[20] electronically means that there's no manual
[21] input. You have to —we're saying you need to
[22] read it in light of the specification?
[23] At another place, Simplification
[24] specifically disclaimed all manual input outside

[1] of initiation. Mr. Sartori said at the hearing
[2] and I quote, "That is manual intervention. And
[3] that has to do with step 11, which is the manual
[4] step required to initiate it, to initiate the
[5] automatic process. That's taken from column 5,
[6] line 45, what you've been focusing on, sir, Your
[7] Honor. And that has to do with step 11, which
[8] is the manual stuff."
[9] Judge Lee said, "I see. So you're
[10] allocating all of these manual input to the
[11] category of initiating the process."
[12] Mr. Sartori, "Yes, yes."
[13] Judge Lee, "If there's any manual
[14] input outside of initiation, then it's not
[15] covered by the claim."
[16] Mr. Sartori, "It's not covered by
[17] the claim and it does not anticipate the claim."
[18] So with all of this backdrop, we
[19] have a section taken out of the chart which is
[20] their Figure 1, Claim 11 —excuse me, step 11
[21] is the unclaimed manual initiation step and then
[22] you see steps 12, 13 and 14. Step 12 they're
[23] connecting electronically to a tax data
[24] provider. They're connecting electronically the
[1]

Page 73

[1] tax data from a tax data provider. In step 13
[2] we're processing that tax data they provided.
[3] And then in step 14 they're preparing
[4] electronically an electronic tax return using
[5] the processed tax data.
[6] And we've highlighted on the left
[7] there that's our addition in step 12, 13 and 14
[8] that there is no manual input allowed, there is
[9] no manual input even discussed with respect to
[10] those steps in the patent.
[11] Your Honor, we found a case, it's
[12] a relatively recent case which we think is
[13] directly on point here, this is Ormco,
[14] O-R-M-C-O, versus Align Tech, or Align
[15] Technologies. Similar kind of fact pattern in
[16] the sense that there was a lot of discussion in
[17] the patent about this software program being
[18] fully automatic. It was an orthodontics
[19] invention where an orthodontist would start this
[20] program, and it would provide the optimum
[21] finished positioning for the teeth of the person
[22] who the orthodontist was working on.
[23] And the Court said in there, and I
[24] quote, From the beginning of the common
[N1]

Page 74

[1] specification of the Ormco patents, it is clear
[2] that the inventor's primary basis for
[3] distinguishing their invention was its high
[4] level of automation and the design of custom
[5] orthodontic appliances as compared to the prior
[6] art.
[7] Continuing in that same case, the
[8] Ormco case, the Court is quoted as saying we are
[9] mindful of the prosecution that we must not
[10] incorporate into the claims limitations only
[11] found in the specification.
[12] We are not doing the here, nor did
[13] the district court. We are interpreting the
[14] claims in light of the specification. The
[15] situation here involves specifications that in
[16] all respects tell us what the claims mean
[17] buttressed by statements made during prosecution
[18] in order to overcome a rejection over prior art.
[19] Accordingly to attribute to the claims a meaning
[20] broader than any indicated in the patent and
[21] their prosecution history would be to ignore the
[22] totality of the facts of the case and exalt
[23] slogans over real meaning.
[24] Simplification's arguments in our

Page 75

Page 77

[1] view, Your Honor, you are unavailing. First,
[2] the clear disavowal in the prosecution history
[3] are not ambiguous and they weren't taken out of
[4] context.
[5] Second the claim term comprising
[6] does not shield the patents from a clear
[7] disavowal of claim scope. I think this is an
[8] important point. Simplification keeps wanting
[9] to come back to the word comprising saying it's
[10] open ended. You know what, I agree with that.
[11] The problem is when you as the inventor, when
[12] you take that word and you squash it by telling
[13] the Court — excuse me, telling the patent
[14] office, clear disavowal of claim scope, you can
[15] overpower the word comprising which is exactly
[16] what they did with their disavowals in the
[17] proceedings at the patent office.
[18] Third, it makes no difference
[19] whether the board relied on the arguments or
[20] not, surrendered claim scope is still
[21] surrendered claim scope. Once surrendered, they
[22] can't recapture it. Frankly the term
[23] electronically cannot mean one thing in one
[24] claim step and another thing in another claim

[1] step. It has to have the same meaning
[2] throughout.
[3] Then we get to the means plus
[4] function claims and that we are arguing do not
[5] possess sufficient structure to meet the
[6] requirements of 112, paragraph 6 of the code.
[7] We think the Aristocrat case, very recent case
[8] out of the Federal Circuit decided just several
[9] weeks ago says, and I quote, the point of the
[10] requirement that the patentee disclose
[11] particular structure in the specification and
[12] that the scope of the patent claims be limited
[13] to that structure and its equivalents is to
[14] avoid pure functional claiming. Close quote.
[15] For a computer implemented means
[16] plus function step, the Federal Circuit has
[17] repeatedly held there must be an algorithm. It
[18] must be disclosed to meet the requirements.
[19] Simplification failed to show and cannot show a
[20] single algorithm for carrying out the claimed
[21] functions in the specification. The limited
[22] structure cited by Simplification is not an
[23] algorithm.
[24] Here is an example in step 14 of
[1]

[1] Figure 1, means for preparing electronically is
[2] defined entirely by box 14 according to
[3] Simplification.
[4] Well, in that little box with no
[5] meat on it, they're trying to say everything we
[6] need to know to satisfy 112, paragraph 6, we
[7] disagree with that.
[8] You can see here is a
[9] representative claim, this is Claim 1 of the
[10] '787, the fourth element of that claim refers to
[11] the means for preparing electronically, an
[12] electronic tax return. If you look in the prior
[13] —if you look in the prior element, means for
[14] processing electronically, and then the prior
[15] element to that, element two of that claim,
[16] Claim 1 of the '787, means for collecting
[17] electronically, and then the first point means
[18] for connecting electronically, these are all
[19] functional statements, and they have little if
[20] any structural support that we can find in the
[21] patent.
[22] In Figure 2, they point to Box 21
[23] of that figure, but it does not provide the
[24] needed algorithm. It's even less helpful than

[1] Figure 1.
[2] Here is the chart of the relative
[3] claim terms which I won't go through. We'll
[4] skip through this.
[5] And, Your Honor, what I want to
[6] say with respect to the means plus function
[7] claims is to ask the Court to consider this.
[8] Why does the CAFC want an algorithm in the
[9] claims? Why is that important? And what must
[10] it talk about?
[11] And as I was listening to
[12] Simplification's arguments earlier today, I
[13] thought of the following things that are not
[14] answered by their patents. And it's very
[15] frustrating that it's not in there anywhere.
[16] Take, for example, means for
[17] connecting. And we see these statements that
[18] well, it could be a modem, it could be this, it
[19] could be that. Where is the algorithm or
[20] instructions for connecting to the tax data
[21] providers who are left to believe that this is
[22] just a piece of cake, that there is nothing
[23] complicated to it.
[24] Here is some specific questions
[1]

Page 79

[1] that aren't answered by the patent. In what
[2] format do you connect? Are we all to believe
[3] that everyone in the world runs the same format?
[4] Of course they don't.
[5] What network platform are you
[6] going to use? There are no instructions in this
[7] patent telling us what platform they are going
[8] to use to go out and get the data.
[9] The tax data providers will be
[10] using their own internal network systems. If we
[11] go to your employer, if we go to your bank,
[12] they're going to have their own internal network
[13] systems. They're likely to be very different
[14] from the next business down the street and the
[15] next business down the street.
[16] How does the system of
[17] Simplification's patents manage that problem?
[18] There is no algorithm given for how they're
[19] going to handle that problem. But it gets worse
[20] for them, and that's in the means for
[21] collecting. So somehow they've managed to
[22] connect to these desperate systems, and now
[23] they're getting a data stream that's coming down
[24] the pike. Where in this patent does it say

Page 80

[1] anything about how you collect that data? And
[2] here is some real world problems that they have
[3] that they haven't solved and it's not in the
[4] patent anywhere.
[5] And that is once the connections
[6] are established and the data is being received,
[7] where is the algorithm for putting the data in
[8] the appropriate places in the form? You got a
[9] tax form, you're getting the stream of data,
[10] it's coming in, it's saying your mortgage
[11] interest last year was X, your wages were Y,
[12] your charitable deductions were Z, where does it
[13] put X, Y and Z? And there is no algorithm to
[14] tell us where it puts that data that's coming
[15] in. We're left to kind of assume that it
[16] magically found its way into the right places in
[17] the tax forms.
[18] There is no algorithm to show us
[19] how that all works. It's complicated. Having
[20] represented Block, I can tell you it's a very
[21] complicated problem.
[22] There is a statement made in the
[23] oral hearing that was brought up today by
[24] Simplification about the Purple Heart charity,

Page 81

[1] and that caught my eye, because the Purple Heart
[2] charity was mentioned at the oral hearing as
[3] though you could go out and get your charitable
[4] deductions, you could get that manually, you
[5] wouldn't have to get that necessarily fully
[6] electronically, fully automatically. But it's
[7] interesting that that was said at the oral
[8] hearing because at column four, lines 65 over to
[9] the top of column five of the patents, and I'm
[10] reasonably sure it's exactly the same in both
[11] patents because the specifications are the same
[12] in both patents, it says, for example, the
[13] taxpayer could be asked about whether the
[14] taxpayer has donated money or other items to
[15] charity, i.e., Purple Heart. That's my comment
[16] about Purple Heart. Purple Heart is not
[17] mentioned in here.
[18] And I continue the quote. If the
[19] taxpayer has donated the electronic intermediary
[20] then notes that these charities need to be
[21] electronically contacted for collection of tax
[22] data, so the patent says one thing and at the
[23] oral hearing there was something else said.
[24] The patent says if you want your

Page 82

[1] charitable deductions, you go out electronically
[2] and get those. But at the oral hearing, they
[3] said you can contact Purple Heart and if they
[4] can't get it to you electronically, you can put
[5] it in manually. But nowhere is that found in
[6] the patent. It's just not in the patent
[7] anywhere.
[8] So with comments made at the oral
[9] hearing which we think are very clear,
[10] unambiguous, disavowal of claim scope, when you
[11] look at the prior art, where the prior art was,
[12] you look at how some automation was already
[13] there, you look at how manual inputting was
[14] already there, and how does Simplification get a
[15] patent here?
[16] The only way they could get the
[17] patent to get around Beamer, to get around
[18] TurboTax, to get around all those products that
[19] were out there before, the only way they could
[20] do it is to say we're fully automated, we did
[21] the whole thing in a fully automated fashion.
[22] So starting with the very first
[23] words of the title of their patent, fully
[24] automated, we think this Court needs to hold

Page 83

[1] them, Your Honor, to what they said all through
[2] the process which was full automation, and
[3] except for one reference to a Purple Heart
[4] charity in an oral hearing that doesn't comport
[5] with what the patent says, other than that one
[6] tiny mention, there is no mention anywhere that
[7] once you set this thing up that there is any
[8] manual intervention, it's all automatic from
[9] that point.

[10] Thank you, Your Honor. We
[11] appreciate your attention.

[12] THE COURT: Let me ask you a
[13] question. And I didn't want to interrupt you, I
[14] wanted you to get through the full presentation.
[15] When I was reading your papers, I
[16] understand the fully automated argument, and I
[17] know that you want to stay away from claim
[18] interpretation becoming or being done in the
[19] context of infringement, infringing, but I can't
[20] help but when I listened to you today and when I
[21] was reading your brief to think about that, and
[22] like schedules and, you know, your typical tax
[23] documents that you prepare, and then the
[24] integration with required information.

[1]

Page 84

[1] You believe it's possible to have
[2] a fully automated program.

[3] MR. STANDLEY: In the future, yes,
[4] I do believe that will happen.

[5] THE COURT: And that's what I
[6] think you were saying. But do you think there
[7] is one today?

[8] MR. STANDLEY: We know of none.

[9] THE COURT: And -10

MR. STANDLEY: It's an extremely
11 complex problem, Your Honor. We have tried at
12 Block, Block has tried to do this, has failed.

13 It's a very complicated problem.
14 THE COURT: Just give me a little
15 more about that so I have an understanding, like
16 —and I know you have tried already to give me
17 some explanation, but what would you say in the
18 integration of the —let's say a person or
19 small business's financial information and other
20 necessary information against the required
21 information by the government, is the biggest
22 problem. Do you understand what I'm saying?
23 MR. STANDLEY: I think you're
24 saying, Your Honor, that what we may keep in our

Page 85

[1] own personal finances that doesn't exactly
[2] equate to what the IRS requires us to put on the
[3] tax form.

[4] THE COURT: Yes.

[5] MR. STANDLEY: You're right, we
[6] don't typically keep our daily lives organized
[7] like a form 1040, and how it requires us to
[8] input tax data. But that's —that is an issue,
[9] sure, but it's one of actually probably one of
[10] the more minor issues.
[11] There are serious problems with
[12] connecting to bank networks, with connecting to
[13] state and local taxing authority networks,
[14] connecting to a charity and their network, just
[15] think of those three alone. Every door that you
[16] knock on, they have a different system. It's
[17] mind boggling how you get this stuff, this data
[18] to be able to —how you get your system, one
[19] single system, a tax intermediary, how you get
[20] it to talk to dozen if not hundreds of different
[21] suppliers running different systems. That's the
[22] first problem.
[23] The second problem is assume you
[24] can pull that off, which you may be able to pull
[N1]

Page 86

[1] it off on a very, very small level, small basis,
[2] maybe one or two here and there that you can
[3] sweet talk into allowing you into their facility
[4] to try to see their code and see if it works,
[5] but let's say you can do that with a few, now
[6] you have got a problem, once the data is coming
[7] down the pipeline, what do you do with that
[8] data? That's the next problem. You have got to
[9] import that somehow into a tax return, not as
[10] easy as one might think how that's done.
[11] Certainly we have instances out
[12] there where some things like that maybe have
[13] occurred, but when you're talking about a tax
[14] form and you're talking about no errors, because
[15] you can get into a lot of legal troubles if
[16] there are errors in that tax return, it's an
[17] extremely complex problem.

[18] **THE COURT:** I'm trying to stay
[19] away from infringing, but tell me what it is
[20] that —tell me the extent that Block is able to
[21] prepare an automated return.

[22] **MR. STANDLEY:** Well, we have never
[23] succeeded at it in this sense. What we have
[24] been able to do is we have been able to make a

Page 87

[1] connection to certain W-2 providers, I don't
[2] have the exact number, Your Honor, but I'm
[3] almost certain it's less than ten, and on a
[4] trial basis, which went on for a few years, I'm
[5] not telling you anything I haven't told
[6] Mr. Curtin from Simplification, for a few years
[7] we tried this to get the data from just a W-2,
[8] nothing more, to import into a tax form
[9] automatically without any manual intervention by
[10] the user. We also tried it with 1099s and
[11] 1098s, which I think are mortgage interest and
[12] interest earned.
[13] We have a few examples where we
[14] were able to make the electronic connection and
[15] then ran into problems with respect to getting
[16] it to fill out the tax form properly.
[17] Ultimately the experiment failed, we shut it
[18] down.
[19] But I do want to stress this, that
[20] during those few years where we tried this, and
[21] the Court is ultimately going to hear evidence
[22] about how many times someone tried to use it and
[23] how many times they were successful and how many
[24] times it failed, we'll have all that before the

Page 88

[1] Court, but none of them ever did it the way this
[2] patent, these two patents describe it in the
[3] sense that not a single time were we able to
[4] fully automate the process.
[5] We had a vision to try to do that,
[6] but it never worked. We were never able to get
[7] a fully automated tax form completed. It would
[8] be nice to take all people and error
[9] possibilities out of doing tax returns. It
[10] might make them simpler, but what we found out
[11] is it's a huge problem. But even in those
[12] instances where we were able to successfully get
[13] someone's W-2 data imported into an electronic
[14] tax return, we still had a lot of manual
[15] intervention that occurred after the initiation
[16] step.

[17] **THE COURT:** All right. Thank you.
[18] I appreciate it.

[19] **MR. CURTIN:** Thank you very much,
[20] Your Honor. May it please the Court, I think I
[21] have just a few minutes to make a couple of
[22] brief points. And also I realized Your Honor
[23] after I sat back down that while I passed up
[24] copies of the slides and then handed those to

Page 89

[1] opposing counsel as well, I had not provided the
[2] Court with copies of the Elmo pages that we had
[3] shown with the highlighting. And if the Court
[4] would be interested in that, we can certainly
[5] provide copies to you for your files and
[6] opposing counsel when we're done if that's okay.
[7] Well, there are a few points, Your
[8] Honor, I want to address and I believe I can do
[9] this relatively quickly. The first thing that
[10] is important I think that struck me based on
[11] Mr. Standley's presentation, Your Honor, was
[12] that Block has spent an awful lot of time
[13] talking about the requirement that the recited
[14] claim limitations be performed automatically,
[15] and we don't dispute that.
[16] Block acknowledges in its
[17] presentation repeatedly that those arguments
[18] about electronically were made in the context of
[19] Claims 1 and 10 of the '787 patent, and
[20] Mr. Standley's argument for why that has to be
[21] imported into all the other claims is because he
[22] argues the word electronically must mean the
[23] same thing in all claims.
[24] Well, Your Honor, that's just not

Page 90

Page 92

[1] so when you consider that we're talking about
[2] the very special definition point that Block is
[3] relying on. It was not focused on
[4] electronically in and of itself, it was focused
[5] on connecting electronically and collecting
[6] electronically in the context of those two
[7] claims, those two claim limitations.
[8] So Block's argument because they
[9] say it as to one you say it as to all goes
[10] completely contrary to the point they're
[11] completely relying on which is the patentee
[12] can't adopt a special definition for a
[13] particular claim term for a special context to
[14] justify the claim meaning.
[15] In that respect the context of
[16] what we're talking about there is critical.
[17] Now, there are a couple of points
[18] I want to mention to Your Honor, and I'm going
[19] to use the Elmo to illustrate.
[20] The first point, Your Honor, is
[21] Mr. Standley spends a considerable amount of
[22] time in his presentation poo-pooing figures one
[23] and two of the patents, which are what he calls
[24] stick figures.

[1] show how to do that including the fact that they
[2] call out commercially available software, which
[3] under the law is sufficient structure for
[4] processing tax returns.
[5] I also, Your Honor, I want to
[6] address Mr. Standley's contention that with
[7] regard to the definition to fully automated
[8] point that you must construe the claims as being
[9] fully automated because he says there is no
[10] manual intervention described in the patent
[11] after step 11.
[12] Well, Your Honor, that is simply
[13] not the case. And we showed that that's not the
[14] case in my initial presentation. But I'll
[15] emphasize a couple of points. First all, we saw
[16] the preference from step 12 back to 7, it talks
[17] about that they act on that to go out and
[18] connect to and collect the data.
[19] But most specifically, let's go
[20] back to column six, but a different part of
[21] column six than Mr. Standley was looking at.
[22] These are cites, Your Honor, that I gave you in
[23] my earlier presentation. I want to cull out
[24] this language for you. Mr. Standley says, of

Page 91

Page 93

[1] Well, that may very well be what
[2] Mr. Standley calls them, but what they're called
[3] are flow charts. They're called diagrams.
[4] They're the diagrams that are standard in
[5] describing software programs. If you look to a
[6] patent that talks about software, if you look to
[7] a patent that has computer information, you're
[8] going to find diagrams, you're going to find
[9] flow charts. And for one of ordinary skill in
[10] the art, of course they are not highly detailed.
[11] The law does not require that you set forth the
[12] source code, but at the same time it puts the
[13] meat on the bone in the sense that it lays out
[14] the steps that the software is to follow.
[15] And these are amplified, Your
[16] Honor, these individual boxes that say collect
[17] tax data, process tax data, prepare tax data are
[18] amplified by the description and steps
[19] Simplification has spent considerable time on,
[20] and it is certainly just not the case that as
[21] Mr. Standley said, that we're relying on say box
[22] 14, prepare electronic tax returns. In fact, I
[23] spent considerable time with Your Honor
[24] discussing the structure in the patent that does
[25]

[1] course, after step 11 there is no manual
[2] intervention described. Here we are. In step
[3] 13, the electronic intermediary processes the
[4] tax data obtained electronically from the fact
[5] data provided in step 12. In the present
[6] invention, step 13 can be implemented using a
[7] computer program similar to the computer
[8] programs currently available in the marketplace
[9] such as TurboTax which is a registered trademark
[10] of Intuit, Inc.
[11] And it goes on, Your Honor. Then
[12] let's go down a little bit, a little farther
[13] down the column, this is all in column six of
[14] the patent, particularly I'm reading —I was
[15] reading column six lines 33 to 36, and now at
[16] column six lines 54 to 56.
[17] Similar to step 13, step 14 can be
[18] implemented using current technology. The
[19] reference back to TurboTax. That structure,
[20] Your Honor, that structure under the law, that's
[21] a commercially available product. That tells
[22] you what you need to do. It points the person
[23] of skill in the art what they need to do to
[24] perform that step. And as I showed Your Honor

Page 94

Page 96

[1] in great detail, that 1997 technology, that
[2] TurboTax software, for example, was not a fully
[3] automated piece of software, that step is not
[4] fully automated.
[5] Processing and preparing are not
[6] fully automated given those references certainly
[7] and that's clear from that description of the
[8] specification. Manual intervention throughout,
[9] the program responds to that manual intervention
[10] by automatically processing and automatically
[11] preparing the tax return, but it is simply not
[12] fully automated.
[13] And let's turn back to a passage
[14] of the specification that Mr. Standley culled
[15] out on one of his slides, talking about what
[16] this invention was intended to do. And he talks
[17] about how it says the invention eliminates the
[18] current requirement, but let's look at that
[19] language a little more closely. Hence with the
[20] electronic collection of tax data as in step 12,
[21] the invention eliminates the current requirement
[22] that a taxpayer manually collect the tax data,
[23] not all tax data, it's the tax data, the tax
[24] data that is capable of being electronically

[1] the claims that define the invention. A method
[2] for automatic tax reporting by an electronic
[3] intermediary comprising, connecting
[4] electronically said electronic intermediary to a
[5] tax data provider. One or more is what A means
[6] under the patent law.
[7] Collecting electronically tax
[8] data, again not all tax data, from said tax data
[9] provider, processing electronically said tax
[10] data collected electronically from said tax data
[11] provider to obtain processed tax data.
[12] Again, you're electronically
[13] processing the tax data that you collected from
[14] the tax data provider. It does not say all the
[15] tax data necessary for the return.
[16] Preparing electronically an
[17] electronic tax return using said processed tax
[18] data, which ties back to said collected tax
[19] data. There is nothing in the structure of the
[20] claims, Your Honor, that requires that all the
[21] tax data used to prepare the tax return be
[22] collected electronically according to the
[23] recited —according to the recited steps, just
[24] that one or more pieces of tax data be collected
[1]

Page 95

Page 97

[1] collected under step 12 which as I described to
[2] Your Honor, nothing in the patent suggest that
[3] all the tax data in the world is available and
[4] capable of being collected electronically.
[5] It eliminates the current
[6] requirement that the taxpayer manually enter
[7] such tax data to a tax return or into a
[8] computer, there you go. Again, such tax data,
[9] the tax data that was collected electronically.
[10] It is not saying that it's all the tax data you
[11] will need to do your tax return, necessarily.
[12] For a person with a simple return
[13] who just needs a W-2, probably all of it is
[14] available electronically to be gathered. For
[15] many taxpayers it will not be. The patent
[16] recognizes that.
[17] That is also supported, Your
[18] Honor, by the structure of the claims
[19] themselves. I beg the Court's indulgence for a
[20] moment, I seem to have lost the claims.
[21] Let's look at Claim 1 of the '052
[22] patent, Your Honor, and this is in column eight
[23] of the patent. And it talks about the method
[24] and this is, of course, the actual language of

[1] electronically and handled according to the
[2] steps set forth in order to satisfy the
[3] limitations of the claim.
[4] And that actually, Your Honor, is
[5] not inconsistent with another point I wanted to
[6] address that Mr. Standley made regarding I think
[7] the only passage Mr. Standley pulled up from the
[8] hearing transcript that I had not already
[9] discussed with Your Honor. It comes at page 30.
[10] If there is any manual input
[11] outside of initiation, then it's not covered by
[12] the claim. Mr. Sartori, it's not covered by the
[13] claim and it does not anticipate the claim.
[14] Mr. Standley uses that to argue on
[15] a process basis that after —that this response
[16] should be used to say a process basis,
[17] Simplification is saying from the start of the
[18] process forward there can be no manual
[19] intervention.
[20] It's equally appropriate, Your
[21] Honor, to say, Mr. Sartori, if there is any
[22] manual input outside of initiation of the
[23] particular steps of the particular function,
[24] then it's not covered by the claim. Mr. Sartori
[1]

Page 98

[1] would agree, it's not covered by the claim. It
[2] does not meet the claim limitation and it does
[3] not anticipate the claim. He's talking about
[4] validity points, he's focusing on what the prior
[5] art has shown.
[6] And you have to at least of course
[7] consider this statement in context with a
[8] statement we showed you earlier, which is
[9] expressly to the contrary of Block's
[10] interpretation. Judge Moore plainly ask the
[11] question. So you read these claims as excluding
[12] all manual data entries?
[13] No, it doesn't for the fact that
[14] it's comprising, so it's open ended.
[15] Even if you construe that part of
[16] Claim 30 in the way —pardon, that part of page
[17] 30 in the way that Block urges, Your Honor, and
[18] we submit there are certainly other reasonable
[19] interpretations, given that view of the
[20] transcript as a whole, it runs flatly head on in
[21] what was said on Claim 8. It's a wash, because
[22] it's not as if that was a concession that was
[23] necessary in the prior art, in fact this is
[24] important for you to consider in the context of

Page 99

[1] —I mean, I guess Block's interpretation is not
[2] necessary for Simplification to have won
[3] issuance over the prior art.
[4] And Mr. Standley is certainly
[5] correct that disavowal, the board doesn't have
[6] to have relied on it, but it's worth noting in
[7] the context of briefs in which Simplification
[8] has said that we were clinging to these
[9] interpretations, and Block has said we are
[10] clinging to these interpretations like a life
[11] boat, that these issues never appeared in the
[12] decision of the board.
[13] The board doesn't analyze
[14] automatic, the board doesn't analyze
[15] electronically. The decision of the board that
[16] allowed these patents to issue over the prior
[17] art hinges on the definition of the tax data.
[18] They say that Beamer and the other references do
[19] not disclose the collection of tax data. So
[20] that was the issue. And that's worth noting to
[21] kind of better get the flavor of the issue.
[22] And one other point, Your Honor, I
[23] would like to also hit the Ormco case now if we
[24] could. I have some slides here. Mr. Standley

Page 100

[1] talked about Ormco to a considerable extent.
[2] In Ormco, the Federal Circuit
[3] found that statements in the specification and
[4] prosecution history limited the claims to prior
[5] automatic positioning without manual
[6] intervention after the process was started. And
[7] that is correct. But Block's reliance on Ormco
[8] is misplaced because here is a quote from Ormco
[9] that the Federal Circuit found important.
[10] Nowhere does the specification suggest or even
[11] allow for human adjustment of the
[12] computer-calculated tooth finish positions.
[13] Next slide, please. By contrast,
[14] Your Honor, Simplification's statements in the
[15] specification emphasize, for example, that
[16] software incorporating some manual intervention
[17] and manual entry falls within the scope of the
[18] patent. And also substantially hits the all tax
[19] data and virtually all hard copies language that
[20] I showed you. Therefore, Simplification's
[21] patents and the specification in
[22] Simplification's patents tell a different story
[23] than the specification of the patents issued at
[24] Ormco.
[1]

Page 101

[1] So again, this Ormco case will not
[2] bear the weight that Block assigns it.
[3] One last point, Your Honor. And I
[4] wanted to address the issues Mr. Standley raised
[5] about the means plus functions claims. And I
[6] hit this already to some extent.
[7] Mr. Standley says there is just no
[8] structure disclosed in the specification. And
[9] that is simply not so. As I have shown before,
[10] the specification makes it clear that the steps
[11] in the process are not all fully automated,
[12] calling out commercially available software
[13] including TurboTax, in that same context that
[14] calls out structure, that calls out structure
[15] for preparing and for the processing steps, the
[16] disclosure of the IRS E-filing in addition to
[17] TurboTax calls out structure for the filing
[18] steps.
[19] And for collecting and connecting
[20] electronically, Your Honor, the specification
[21] sets out a step wise process for what needs to
[22] be done.
[23] Now, Mr. Standley says, well,
[24] there are a lots of problems still, a lot of

Page 102

[1] details that aren't addressed by these patents,
[2] and that's certainly true. And those details
[3] are important to the commercial implementation
[4] of the product. And while this is as you said,
[5] Your Honor, we're not talking about commercial
[6] embodiments here, we're not talking about the
[7] accused product, it's not necessarily relevant
[8] to claim construction. Block did have terrible
[9] trouble trying to do this, but contrary to what
[10] Mr. Standley said, to the extent this may be
[11] relevant to the Court's understanding of the
[12] environment, what he calls a trial program, we
[13] call —we seem to see from the documents we can
[14] decipher on a large number of commercial sales
[15] and the documents to the extent we can decipher
[16] them show that there were hundreds of thousands
[17] of downloaded, tens of hundreds of thousands
[18] that were successful. To the extent we can
[19] tell, to the extent we can decipher Block's
[20] documents, we are going to have depositions on
[21] that relatively soon to figure that out. But
[22] the law simply does not require that the patent
[23] disclosed every single, every single detail
[24] necessary for implementation, so these details

Page 103

[1] are important to commercial implementation of
[2] it, but you don't have to hit every step in the
[3] algorithm and that is clear. In fact, there is
[4] no way a patentee could know what CitiBank would
[5] require for format or what Fidelity would
[6] require or what Block would require, that is
[7] just not realistic and that's not the law.
[8] In fact, the specifications of the
[9] Miller patents present far more detail than the
[10] patents that were at issue and that were found
[11] to be invalid in the Aristocrat and Harris case.
[12] In the Aristocrat case, for
[13] example, Your Honor, there was an improvement
[14] for slot machines and a specification to look at
[15] the opinion, the specification essentially said
[16] a computer will do this, a particular feature,
[17] and that's it.
[18] So that's a very different
[19] situation, again, than what we're facing here
[20] with Simplification and with these patents.
[21] And with that, Your Honor, I will
[22] make one more —one final point. With the
[23] definition of automatic, Your Honor, and the
[24] parties' proposed constructions, it seems to me

Page 104

[1] that the parties agree on some of the language,
[2] no manual intervention after initiation, the
[3] question is where you draw the line.
[4] The —and Block attempts to draw
[5] the line with a fully automated definition that
[6] requires that the taxpayer enter his name and
[7] enter some identifying information at the very
[8] beginning of the process, hit a button and then
[9] lean back in his chair and he doesn't have to do
[10] anything until the tax refund check hits his
[11] bank account.
[12] Well, Your Honor, that is not what
[13] is claimed in these patents. That is not what
[14] is described in the specification. That may be
[15] fully automated, but that is not automatic.
[16] And that is also a process, Your
[17] Honor, that as Mr. Standley implicitly
[18] acknowledged was not available in 1997 and was
[19] not performed by the software that the
[20] specification calls out. It's not in the patent
[21] record, it's not required and it's not
[22] consistent with either reality or with the
[23] patents in this case.
[24] Thank you, Your Honor.

[1] **THE COURT:** All right. Let me ask
[2] you a question. Actually I don't remember doing
[3] a tax return, I think my wife has always done
[4] them, but I have watched the process. And she
[5] gets in an office and tons of information is
[6] spread out, and then there is a sheet of paper
[7] that the accountant has her fill out, just about
[8] what information is there.
[9] And then she starts putting it on
[10] some sort of a disk that the accountant gave
[11] her. Is that when it's supposed to kick in as
[12] automatic?
[13] Well, give me your best estimate
[14] of when all the stuff that wasn't available
[15] already on the monthly P & Ls becomes automatic.
[16] **MR. CURTIN:** Very well, Your
[17] Honor. Just one moment. Let me get the patent
[18] claim.
[19] **THE COURT:** If it's not fully
[20] automated.
[21] **MR. CURTIN:** Your Honor, to the
[22] extent I understand the question, I mean, is
[23] your question, Your Honor, whether or not what
[24] you're describing -

[1] THE COURT: Here is my question,
[2] make it even simpler. I'm trying to stay away
[3] from infringement analysis, but I'm trying to
[4] understand automatic on your side of the case.
[5] I see people tweaking the
[6] documents, the data, and the end result product
[7] going to the government throughout the process.
[8] You're telling me that there is this striking
[9] point when it becomes automatic. I'm trying to
[10] get some general idea when what you're calling
[11] automatic kicks in.
[12] Your friends on the other side
[13] say, listen, you tried to invent something that
[14] was fully automatic and it doesn't really exist,
[15] but that's what you are describing that the tax
[16] data is supposedly electronically available
[17] kicked you in, that contradicts the idea of
[18] sitting in this room with all these papers
[19] around you, but you seem to have an idea of when
[20] automatic begins.

[21] MR. CURTIN: Yes, Your Honor. And
[22] I think first of all in answering your question,
[23] it's important to understand -24

THE COURT: I'm only talking about

[1] tax data.
[2] MR. CURTIN: With tax data. Well,
[3] tax data is defined in the patent as being
[4] information that is relevant to determining your
[5] tax liability, and they have examples like W-2
[6] data, the information on our 1099s, the
[7] information on your 1098s, those are all
[8] examples given in the patent, and being examples
[9] of the sort of tax data that could be made
[10] available electronically and collected
[11] electronically from the various tax data
[12] providers, such as the IRS and banks.
[13] An accountant sitting down with
[14] the taxpayer figuring out what all the data is,
[15] you know, like boiling down the bank statements,
[16] boiling down all the stuff, as you say, tweaking
[17] the figures, that's not recited in the steps of
[18] the patent, that is sort of —that's
[19] preliminary. That's figuring out other
[20] information in a much more complex situation
[21] that may or may not ever ultimately end up being
[22] within the scope of these claims.
[23] Because to get within the scope of
[24] these claims, Your Honor, it's automatic tax

[1] reporting by an electronic intermediary. In
[2] other words, by a computer. I don't want to
[3] limit that too much, but that's an example. And
[4] I think a data processing network comprising a
[5] computer, when you sit down to the computer and
[6] it says connecting electronically said
[7] electronic intermediary to a tax data provider,
[8] I'll put this up on the Elmo, what the heck.
[9] Connecting electronically said
[10] electronic intermediary to said tax data
[11] provider, that's one of the functions, that's
[12] one of the recited steps in the claims, Your
[13] Honor. And Simplification acknowledges as they
[14] said to the Board of Patent Appeals, and as we
[15] said in our briefs, that those recited steps
[16] individually, those functions must each be
[17] performed automatically after initiation.
[18] So you enter in your data, your
[19] information, you sit down at your computer, you
[20] enter in your information, you hit the button
[21] and the computer goes out to connect
[22] electronically with the tax data provider, say
[23] the IRS, okay, you have hit the button, you have
[24] initiated that step, and then that's when the

[1] automatic kicks in. Like the dishwasher that
[2] operates after you push the button, like the ATM
[3] that give us your account balance and that says
[4] yes, I want it, it goes out and connects,
[5] automatically kicks in, because it's
[6] automatically connected as part of step 12. It
[7] has the information it needs and it collects
[8] that data, and it does so automatically.
[9] And that's Block's examples in its
[10] briefs about getting an E-mail with your W-2,
[11] that's why that doesn't infringe the claims,
[12] because you still have to take that tax data
[13] manually and type it in.
[14] And then so the collecting
[15] electronically step again, that step occurs
[16] automatically. Again, the processing
[17] electronically step, it makes computations with
[18] that collected tax data and you see this, and it
[19] computes with it in response to that data, but
[20] also it can be an iterative process, it ask you
[21] questions and that's why the comprising language
[22] is important because it don't foreclose the
[23] concept of as the specification discloses, a tax
[24] preparation software asking you questions, what

Page 110

[1] do you need, what kind of data do you have,
[2] what's your tax situation, and you answer those
[3] questions and you hit the button, you click the
[4] mouse, and then you have given your input, you
[5] have initiated it and automatic kicks in, it
[6] processes electronically your responses, that's
[7] the difference between automatic and fully
[8] automated, because there are some intervening
[9] manual steps which comprising allows for.

[10] And then, you know, once the
[11] programs process that tax data, it's prepared
[12] electronically in an electronic tax return using
[13] the data in there, and the invention, it
[14] performs that automatically, and that you're not
[15] telling it, you know, set up the form to look
[16] this way, put this data here and here, at least
[17] within the recited steps of the invention,
[18] recited steps in the claim, it does that
[19] automatically, but it does it in response to you
[20] saying okay, give me the tax return.
[21] And with the filing steps
[22] similarly, Your Honor, the automatic kicks in
[23] after you hit the button, you say okay, now I'm
[24] filing, I'm ready to file, you know, you may

12 Honor, because after that, because you do that
13 before you hit the button to say okay file, and
14 then you have initiated that step and the filing
15 occurs, and then it's automatic because the
16 machine does it. The computer to use an example
17 does it.
18 Just like after you're dealing
19 with the automatic teller machine and it ask
20 you, as an example, of automatic versus fully
21 automated, it ask you, if it's fully automated,
22 you're not making input, you're not doing
23 things, but if it's automatic, the ATM ask you,
24 okay, what do you want? Would you like your

[15]

Page 111

[1] have —for example, you put in yes, I'm done,
[2] here is the account, some of the dependent
[3] claims talk about getting a refund or paying
[4] your taxes and you can arrange to do that
[5] electronically as well, you have to put in your
[6] bank account information, you may have to input
[7] that information, here is my account information
[8] to -9

THE COURT: But that doesn't
10 interfere with the trigger of automatic?
11 MR. CURTIN: That doesn't, Your

[1] account balance? Yes. You made some input
[2] there. Do you want checking or savings? Yes,
[3] it gives you the balance.
[4] Do you want money? Yes. And then
[5] it gives you the money that you asked for. You
[6] have to type in those inputs. But in each step
[7] after those inputs, the machine did it
[8] automatically, that's when the automatic kicks
[9] in.

[10] And in this patent, the automatic
[11] kicks in after the initiation of every listed
[12] step, every listed claim element. I'm pointing
[13] specifically at Claim 1 of the '052 patent.
[14] But the difference between
[15] automatic which is what's claimed there and
[16] fully automated which is what Block argues is
[17] the comprising language that allows for
[18] intervening —so comprising is consistent with
[19] automatic because it allows for —it allows for
[20] the presence of the intervening steps.
[21] The automatic doesn't kick in back
[22] at the very beginning where the taxpayer after
[23] that can lean back in the chair and not do
[24] anything more until the refund comes in, the

Page 113

[1] automatic kicks in —sorry if that was a long
[2] answer, Your Honor.

[3] **THE COURT:** No, it's —I'm just
[4] wondering, so I own this house at the lake with
[5] my brother-in-law, and I work for DuPont, and
[6] DuPont issues me a W-2, and I don't have any
[7] health care or anything like that, and I can get
[8] that electronically; right?

[9] **MR. CURTIN:** I'll assume so, Your
[10] Honor, for the question.

[11] **THE COURT:** Let's just assume for
[12] the question that DuPont issues it and it kicks
[13] out electronically, and it can be moved right to
[14] my computer. And I don't have any major health
[15] deductions. I don't have any health accounts.
[16] So I'm pretty setup to push the button to send
[17] it to the IRS. I'm trying to make that part
[18] real simple.

[19] Well, I got this house at the lake
[20] with my brother-in-law and, you know, we each
[21] take two weeks, we rent it, we have rental
[22] income coming in, it's an old house so we do a
[23] lot of repairs and we have to issue 1099s to the
[24] people that come and paint it and the people

Page 114

[1] that do the sidewalks and the grounds and
[2] everything. None of that is electronic except
[3] payment out because I have a program to my
[4] accountant that mirrors my account for the
[5] house.

[6] **MR. CURTIN:** I think I'm with you.

[7] **THE COURT:** At what point am I
[8] automatic under the patent?

[9] **MR. CURTIN:** Well, there —there
[10] are a couple of different questions there, Your
[11] Honor, and I'll attempt to answer them both to
[12] the extent that I understand them.
[13] One question is when are you
[14] acting —or when is something occurring
[15] automatically as Simplification would construe
[16] that term under the patent. That is different
[17] from when or if whatever you happen to be doing
[18] falls within the scope of the claims.
[19] In terms of the meaning, purely
[20] the meaning of automatic, I would say that when
[21] —you mentioned paying electronically, when you
[22] hit the button -23

THE COURT: You pay the mortgage
24 electronically, and every month you pay your

Page 115

[1] expenses on that lake house through an account,
[2] and your accountant has already set up a program
[3] that records all those payments. And, in fact,
[4] at the end of the tax year is able to issue as I
[5] understand it in today's world, they issue 1099s
[6] for people that do work for you.

[7] **MR. CURTIN:** Yes, Your Honor.

[8] **THE COURT:** So it's able to do
[9] that. But is that —is that all under the
[10] automatic idea of the patent?

[11] **MR. CURTIN:** Well, Your Honor, I'm
[12] not sure if any of that would necessarily fall
[13] within the scope of the claims, but just to
[14] focus on the automatic issue, I think what
[15] you're describing, Your Honor, the answer is if
[16] you're clicking buttons to make individual
[17] payments like I, for example, do electronic
[18] banking sometimes and I go to my account and
[19] they will allow to you make payments
[20] electronically from your account, you enter in
[21] the information, you have already set it up with
[22] who the payee is, you enter in the amount of the
[23] payment and the date you want to have it paid,
[24] so those are the -

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THE COURT: You do it all by wire
transfer.

MR. CURTIN: You hit the button

and the bank is telling you on X date we will send this much money from your account, that's happening automatically after you have initiated it.

THE COURT: And I can have a program that if I put it under a certain notation it will treat it as an expense on my program for the end of the year.

MR. CURTIN: Well, then that tax program is doing that automatically, Your Honor.

THE COURT: Does that infringe the patent?

MR. CURTIN: Based on the description you have said, Your Honor, I don't think so, because the patent is focusing on automatic tax reporting, not on the details of individual accounting.

THE COURT: So then when I -automatic only kicks in for purposes of infringement when I push the button to send it to the IRS.

[4]

[1] MR. CURTIN: Well, Your Honor,
[2] that depends on the claim. I mean, taking this
[3] out of the context if I can, because I think
[4] it's important to be clear on this, of the
[5] example we're working with, the claims of the
[6] '052 patent, all except Claim 20 do have a
[7] filing step, so certainly to the extent —I
[8] know you're not doing an infringement analysis
[9] here, but to the extent you're talking about
[10] falling within the scope of the claims, yes, you
[11] do have to file with the IRS to fall within
[12] Claims 1 and 19. I think Claim 20 does not have
[13] a filing step, that's a separate kind of claim.
[14] But that —but then what you do
[15] is you have to look at each element of course to
[16] see whether with regard to whatever transaction
[17] we're talking about, you have connected
[18] electronically your computer to the tax data
[19] provider, collected tax data electronically, and
[20] that's different than just your bank account
[21] information, or a payment you made to a —and
[22] that's something the process actually makes
[23] clear, that's different from a given payment you
[24] might make to a creditor.

[1] Whether it's processed
[2] electronically to turn it into a tax-return, to
[3] compute your liability and to prepare it
[4] electronically to turn it into a tax return, all
[5] those steps have to be met in order to meet the
[6] requirement of the patent claims. And all those
[7] steps —so that's a little different.
[8] It's not possible for me really to
[9] answer the question whether what you have
[10] described falls within the scope, would infringe
[11] the patent or falls within the scope of the
[12] patent, because you have to look at the patent
[13] as a whole.
[14] We don't want to fall into the
[15] mistake that I think Block makes in their
[16] presentation of looking at a particular claim
[17] term in isolation. And that's the falsity of
[18] some of their analogies and their briefing,
[19] their Claim 20 scenario about the person who
[20] gets a W-2 by E-mail, or their scenario about
[21] the accountant using a calculator could somehow
[22] infringe the claims. Just not so because the
[23] fact that electronically has a certain plain
[24] meaning, so it's doing that electronically in

[1] the broadest sense of the term doesn't mean it
[2] meets the claim language.

[3] You have to connect -4

THE COURT: I think what we're
5 saying, for instance, is when the vendor who
6 repaired the roof at the lake house transmits by

7 E-mail the statement for that work, that they
8 say that that's within the claims, I think.

9 MR. CURTIN: Well, I would certain
10 -11

THE COURT: It's electronically
12 generated. It's a tax data collection, because
13 I'm collecting an expense item. Is that what
14 you think?

15 MR. STANDLEY: Well, Your Honor -16

THE COURT: I don't want to
17 characterize your argument.

18 MR. STANDLEY: That's fine. Your
19 Honor, the example you gave of an E-mail coming
20 in from the man who repairs the roof, because
21 it's in the form of an E-mail, the person
22 preparing the tax return is going to have to
23 take it from site and input it with their
24 fingers through the keyboard into the program,

Page 120

[1] so we're saying that is not automatic because
[2] the person is having to manually input that
[3] roofer's invoice.

[4] MR. CURTIN: On that point, Your
[5] Honor, Simplification would agree, and that
[6] actually parallels an argument that was made
[7] before the Board of Patent Appeals that that is
[8] not being performed automatically.
[9] So I believe in that particular
[10] example, that is not something that —that
[11] likely is not something that itself would fall
[12] within the scope of the claims.

[13] MR. STANDLEY: Your Honor, I do
[14] believe that Mr. Sartori answered your question
[15] when he spoke to the Board of Patent Appeals,
[16] and I believe I have an answer, if I may display
[17] it.

[18] THE COURT: Sure. Did you want to
[19] add anything else?

[20] MR. CURTIN: No, Your Honor. I'm
[21] done.

[22] THE COURT: All right. Thank you.

[23] MR. STANDLEY: I apologize for our
[24] personal mark ups.

[1] THE COURT: Looks like you're
[2] working that testimony there.

[3] MR. STANDLEY: Judge Medley said
[4] so why is that not manual? I'm quoting from the
[5] Board of Patent Appeals oral hearing, continuing
[6] the quote, they have to click on a mouse. They
[7] have to input numbers, let's say my account
[8] number. That's manual, according to what you're
[9] saying is manual. Mr. Sartori on behalf of
[10] Simplification responded and he said, We
[11] completely agree with that. That is manual.
[12] And that is step 11 in the patent. Step 11
[13] talks about the manual part of it. It is the
[14] engaging part. It's the initiation, the
[15] starting of it. You need to tell the software
[16] what your account number is, what your pass code
[17] is. And then once it receives the
[18] information —and, Your Honor, this is very
[19] important —it automatically goes through not
[20] one, not two, it says all the steps in the
[21] process. It goes out to the tax data provider,
[22] collects the tax data, processes the tax data
[23] and prepares the electronic tax return.
[24] Your Honor, you asked, how can you

[1]

Page 122

[1] prepare an electronic tax return unless you have
[2] gone out and gotten all of that information your
[3] wife has assembled on her table top as she's
[4] doing your taxes, the scenario you describe,
[5] this patent is talking about taking all that
[6] paper off your wife's desk, getting rid of it
[7] and going out and getting it all from the tax
[8] data providers sufficient to prepare the
[9] electronic tax return.

[10] And we just don't know of anyone
[11] doing that. But that's what's patented here.
[12] That is the idea. And I think Mr. Sartori very
[13] clearly states, it goes automatically through
[14] all the steps in the process once you get the
[15] account numbers, once you get that setup phase
[16] done, then you just flip the switch and away it
[17] goes.

[18] MR. CURTIN: If I could, Your
[19] Honor?

[20] THE COURT: Sure.

[21] MR. CURTIN: I want to make one
[22] more point in connection with this language and
[23] I don't have the highlighted or marked up
[24] version like Mr. Standley does, but I think it's

[N1]

Page 123

[1] important to also read this passage in light of
[2] the rest of the patent specification, where it's
[3] true here, he says, you initiate, you tell the
[4] software, you give it your account number and
[5] then it goes out and it connects to the tax data
[6] provider, collects that tax data, processes that
[7] tax data and prepares the electronic tax return.
[8] But look at that in the context of
[9] the specification, Your Honor. The
[10] specification makes it clear that there could -11
in fact, that's one of the diagrams that we
12 talked about, there can be many, many tax data
13 providers, so you have to do this, many tax

14 payers would have to do this again and again and
15 again.
16 This statement does not mean that
17 bingo, the tax return is prepared and it is done
18 and it is ready to be filed because that is
19 omitted, it doesn't mean the tax return is all
20 done, it means that you have —after you tell
21 —after you identify a tax data provider and
22 you hit the button, it reaches out
23 automatically, connects to the tax data
24 provider, collects that data back, like a

Page 124

[1] simplest example is a W-2 with the IRS, it
[2] collects your W-2 data back, and then it takes
[3] that information and it processes it like a tax
[4] preparation program does. It puts it in the
[5] right places and does the computations necessary
[6] to help prepare the tax return, but your tax
[7] return is not necessarily done.
[8] And the specification makes it
[9] clear, you may have to do this over and over
[10] again for different tax data providers. If you
[11] look at the definitions in the steps for
[12] preparing the electronic tax return, they're
[13] talking about a process, Your Honor, not the end
[14] result. The end result comes in when you have a
[15] finished tax return, whatever, and I know we're
[16] disputing this, and it's getting late, I don't
[17] want to misspeak, Block is talking about
[18] completed tax return, but whenever the tax
[19] return is ready for filing in whatever state it
[20] is, then you hit the button to file. But this
[21] does not mean and it does not say that after you
[22] initiate the process in step 11 there is no more
[23] manual intervention.
[24] See, automatically goes through

[1] the steps in the process. The individual —and
[2] we have already said that those steps, the
[3] recited steps in the claims must be performed
[4] automatically. That does not preclude the
[5] possibility of all —any kind of manual
[6] intervention. It doesn't preclude the need to
[7] circle back and do it again. It doesn't
[8] preclude the possibility of intervening steps or
[9] for all the reasons we talked about today,
[10] column six the references to -11
THE COURT: When I read your
12 papers and looked at this, I understood clearly
13 your argument in the context of what I'll call a

14 W-2 filer. Block raised this testimony in some
15 arguments about —that puts in your mind folks
16 that aren't necessarily schedule filers, but in
17 any given year of a tax year might be an
18 enhanced W-2 filer.
19 And then when you go to the
20 specifications and you try to read them with
21 that kind of an understanding as opposed to the
22 W-2 filer, that's when you start to have a
23 little difficulty in both your arguments, fully
24 automated and automatic, and the concept of

[1] electronically.
[2] But you have been helpful in
[3] answering the questions and your arguments
[4] today. And a lot of people saying just give us
[5] ten percent of what you made, we would all be
[6] out of business here.
[7] MR. CURTIN: That's true, Your
[8] Honor.
[9] THE COURT: Isn't that the flat
[10] tax, ten percent, or fifteen percent. But I
[11] appreciate your arguments. You have been
[12] helpful.
[13] MR. CURTIN: Thank you, Your
[14] Honor.
[15] THE COURT: Thank you.
[16] MR. STANDLEY: Thank you.
[17] MR. CURTIN: Your Honor, if I
[18] could, one question on another issue if I may.
[19] If it would be possible for the Court to clarify
[20] for my understanding, because I am not Delaware
[21] counsel, the Court's policy or practice
[22] regarding depositions, party depositions. Is it
[23] the case that in the absence of agreement
[24] between the parties otherwise, is it typically

Page 127

Page 128

[1] held in the forum or do you normally do things
[2] differently?
[3]

[4] THE COURT: If there is a dispute,
[5] it would typically be the practice to tell them
[6] to hold it in the jurisdiction here.
[7]

[8] Honor.

[9] dispute?
[10]
[11]

MR. CURTIN:

THE COURT:

MR. CURTIN:

Thank you, Your
Are you having a
I don't know yet.

[12] MR. STANDLEY: Your Honor, we have
[13] an executive who is going to be giving testimony
[14] and it's very difficult for him to leave Kansas
[15] City. He's going to give the testimony, but we
[16] would like to do these depositions in Kansas
[17] City. And I have been doing this for twenty
[18] years and the parties always tend to agree that
[19] his depositions will be at his office and mine
[20] will be at my office.

[21] THE COURT: Typically that's what
[22] happens between parties. You know, when you're
[23] sitting on this side of the bench, if you try to
[24] parse it to each case, you would have no
consistent theme that would be fair. So when

[1] parties can't operate under the normal practice
[2] of noticing, in other words, if it's in Kansas
[3] City, you notice there or notice here, the only
[4] rule that you can have that kind of works, if
[5] you have an argument, then it's in Delaware.
[6] It's not a great solution, but it
[7] is consistent, one of my kid says, consistent
[8] and dumb, but you know, that's all we can do.

[9] MS. GRAHAM: Must be a teenager.

[10] THE COURT: Exactly. But adults,
[11] they're even doing it now. You know, it's hard
[12] to work these out, you don't want to go to
[13] Kansas City. I have been to Kansas City. They
[14] have great steaks at The Stockyard.

[15] MR. CURTIN: I know the food is
[16] fantastic. It's something the parties are
[17] continuing to discuss.

[18] THE COURT: Try to work it out.

[19] If not, then you got to revert to that default
[20] position of Delaware.

[21] MR. CURTIN: Thank you.

[22] THE COURT: Thank you.

[23] (Court adjourned at 5:23 p.m.)
[24]

[N13]

Page 129

[1]
[2] State of Delaware
New Castle County

[3]
[4]
[5] CERTIFICATE OF REPORTER

[6]
[7]
[8] I, Dale C. Hawkins, Registered Merit
a
bove-captioned matter.
[9]

[10] IN WITNESS WHEREOF, I have hereunto set my hand and seal this 15th day of
June, 2008, at Wilmington.

[11]
[12] Dale C. Hawkins, RMR
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O	2005 66:24 2006 15:4; 66:8; 67:1 2007 67:3 21 41:20; 84;; 119: 22 67:1; 84;; 119: 23 59:10; 84;; 114:22; 119: 24 63:21; 84;; 114:22; 119: 27 26;; 59:10 29 21:20	A	able 55:3; 64:22; 85:18, 24; 86:20, 24, 24; 87:14; 88:3, 6, 12 above 41:23 absence 22:24; 23:21; 124:23 absolutely 30:24 accept 49:24 accepting 56:9 access 66:1 accomplished 65:6 according 96:22, 23; 97:1; 120:8 Accordingly 74:19 account 108:3; 111:1; 114:4; 115:20; 120:7, 16; 122:15 accountant 65:4, 4; 104:13; 114:4; 118:21 accounting 66:12 accounts 64:22; 65:22; 113:15 accuracy 65:24 accused 61:22; 102:7 achieved 57:15 acknowledge 10:16; 13:8; 28:22; 34:9 acknowledges 89:16 across 6:15; 7:8; 11:10 act 92:17 acted 31:6 acting 114:14 action 66:8 actual 95:24 actually 15:10; 39:11; 85:9; 97:4; 115:22 add 32:3 addition 73:7; 101:16 additional 12:19, 24 address 9:20; 10:17; 39:21; 89:8; 92:6; 97:6; 101:4 addressed 102:1 adequately 10:16 adjourned 128:23 adjustment 100:11 administrative 11:11 admits 21:10 adopt 90:12 adults 128:10 advances 6:10 advantages 57:14 advice 31:23 afternoon 21:23 again 19:16; 23:9; 32:11, 16; 36:2; 42:3; 46:23; 48:2; 61:5; 95:8; 96:8, 12; 101:1; 103:19; 108:15, 16 against 61:22; 84: ago 6:8, 8; 39:3; 75:9	agree 34:3; 41:10; 98:1; 120:11; 127:17 agreed 33:24; 36:6 agreement 124:23 agrees 19:7 airplane 17:18 algorithm 40:5, 8, 11; 45:10; 75:17, 20, 23; 77:8, 19; 79:18; 80:7, 13, 18; 103:3 Align 73:14, 14 allocating 71:10 allow 100:11 allowance 61:22 allowed 68:9; 73:8; 99:16 allowing 32:22; 86:3 allows 12:19, 24; 13:11, 12; 35:9; 65:19; 110:9; 111:17, 19, 19 almost 19:13; 38:21; 87:3 alone 66:5; 85:15 Along 52:10; 54:3 Alternatives 26:16 although 6:22; 67:7 always 127:17 ambiguous 26:9, 12 among 68:6 amount 218:6 amount 5:9; 55:19; 90:21 amplified 91:15, 18 analogies 118:18 analogy 18:8 analysis 115:8 analyze 99:13, 14 and/or 35:13 Andersen 68:7 answered 77:14; 79:1 anticipate 71:17; 97:13; 98:3 apparatus 1698:3 apparatus 238:3 apparatus 57:16 appeal 66:24; 67:1; 68:19 Appeals 11:5; 51:20; 67:4; 68:20; 120:5 appeared 99:11 appears 9:14; 17:7, 8, 8 appliances 74:5 applicant 68:3 applicant's 68:15 application 6:2, 7; 64:15 applies 36:19 apply 32:14 appreciate 83:11; 88:18; 124:11 appreciation 56:13 approach 31:19; 32:10 appropriate 532:10 appropriate 80:8; 97:20 approval 52:14 April 63:12 argue 97:14	argues 7:7; 23:12; 37:9; 89:22; 111:16 arguing 37:17; 75:4 argument 7:24; 9:5; 11:4, 9; 19:23; 20:10, 14; 37:6; 40:7; 46:19; 48:5; 83:16; 89:20; 90:8; 119;; 128:5 arguments 7:1, 3; 9:23; 19:21; 74:24; 77:12; 89:17; 124:3, 11 Aristocrat 40:2; 45:11; 75:7; 103:11, 12 around 13:13, 18; 54:6; 82:17, 17, 18 arrives 66:2 arrows 40:20 art 10:10, 24; 23:2, 21; 39:1, 8, 9, 14; 40:16; 45:3, 21; 46:5, 9; 63:8, 10; 64:12; 67:18; 74:6, 18; 82:11, 11; 91:10; 93:23; 98:5, 23; 99:3, 17 article 22:3; 57:16 ascertain 5:23 aside 57:3, 6 assembled 122:3 assert 68:10 asserted 64:4, 9; 67:3 asserts 68:17 assess 40:6 assigns 101:2 assist 66:14 assisted 54:10 assume 80:15; 85:23; 113:9, 11 assure 52:19 Athletic 26:16 ATM 108:2 attached 31:4, 14; 49:19 attempt 114:11 attention 83:11 attorney 5:5; 20:8; 63:3, 7 attribute 74:19 August 67:1 authorities 56:8 authority 48:13; 62:14; 85:13 automate 88:4 automated 10:14, 20; 11:23; 15:23; 17:3, 7, 12; 18:7; 26:5; 28:7, 19; 31:7; 32:20; 55:24; 56:18, 21, 22, 24; 57:1, 11; 61:12, 14, 15, 19; 62:9, 11; 82:20, 21, 24; 83:16; 86:21; 88:7; 92:7, 9; 94:3, 4, 6, 12; 101:11; 110:8; 111:16 automates 66:20 automatic 176:20 automatic 7:11, 12, 14; 9:21; 10:5, 7, 21; 11:6, 23, 24; 12:17, 18; 13:6, 11; 15:24; 17:3, 10, 12, 17, 17, 24; 18:6, 7, 14, 16, 19;										
1	1 7:6; 21:1, 12, 24; 22:1, 10, 15; 23:9, 14, 20; 26;; 57:19; 65:15; 71:20; 77:1; 89:19; 95:21; 111:13; 115:12 10 7:6; 21:2, 12, 24; 22:1, 10, 15; 23:9, 15, 20; 26;; 89:19; 119: 1040 85:7 1098 13:18 1098s 87:11; 104:7 1099 13:16 1099s 87:10; 104:6; 113:23 11 41:6, 24; 57:5; 59:21; 63:14; 71:3, 7, 20, 20; 92:11; 93:1; 119;; 120:12, 12 112 75:6 12 23:8; 41:6, 7, 9, 13; 42:7; 59:9, 20, 21; 61:17; 71:22, 22; 73:7; 92:16; 93:5; 94:20; 95:1; 108:6; 119: 13 59:17, 20; 61:2; 71:22; 73:1, 7; 84;; 93:3, 6, 17; 119: 14 59:23; 71:22; 73:3, 7; 75:24; 84;; 91:22; 93:17; 119: 15 61:8; 63:23; 66:9; 84;; 119: 16 84;; 119: 17 84;; 119: 18 66:8; 84;; 119: 19 84;; 115:12; 119: 1996 5:3, 6 1997 5:24; 6:7, 11; 30:13; 31:3, 5; 32:23; 38:20; 42:16, 19; 48:1, 18; 49:17, 18; 51:13; 94:1	3	30 66:24; 97:9; 98:16, 17 33 93:15 35 37:15 36 93:15 39 55:22	4	45 71:6 49 55:22	5	5 71:5 50 56:2 54 93:16 56 93:16 5:23 128:23	6	6 75:6 63 56:3 65 41:5; 81:8	7	7 67:2; 92:16; 119: 787 19119: 787 2219: 787 7:6; 21:2, 13, 23; 22:11, 15; 23:9, 15; 26;; 63:23, 24; 64:2; 67:2; 89:19	8	8 63:12; 98:21; 119: 8453-OL 51:4	9	9 119:
2	2 41:19; 65:15 20 84;; 115:6, 12; 118:19; 119: 2001 37:22 2003 63:12 2004 63:17, 21, 23; 64:1														

19:14, 21; 21:24; 22:19;
24:23:1, 19, 21; 24:7;
26:3, 4; 28:6, 14, 18; 31:5;
34:6, 11, 15, 16, 22; 35:5,
10, 13; 36:4; 38:23; 61:5;
66:17; 71:5; 73:18; 83:8;
96:2; 99:14; 100:5;
103:23; 104:24; 108:1;
110:5, 7, 22; 111:8, 10, 15,
19, 21; 113:1; 114:8, 20
automatically 13:7;
18:12; 19:2, 8; 23:5; 24:11,
18, 21; 31:6; 32:3, 5, 6;
33:23; 35:8; 81:6; 87:9;
89:14; 94:10, 10; 108:5, 6,
8, 16; 110:14, 19; 111:8;
114:15; 120:19; 122:13
automation 55:17; 74:4;
82:12; 83:2
autopilot 17:18
available 5:6; 28:23;
30:3, 7, 12, 14, 17; 42:19;
46:3, 8, 14; 48:4, 18, 20;
49:20; 55:21; 56:22; 92:2;
93:8, 21; 95:3, 14; 101:12;
104:10
avoid 75:14
aware 7:19; 10:9; 67:7
away 18:20; 83:17; 86:19;
122:16
awful 89:12

B

back 5:3; 6:7, 10; 13:13,
18; 22:22; 35:18; 37:4;
42:7, 19, 24; 45:18; 48:24;
49:18, 23; 51:5, 14; 52:19;
63:9; 88:23; 92:16, 20;
93:19; 94:13; 96:18;
111:21, 23
backdrop 71:18
background 17:9; 66:6
balance 18:2; 108:3;
111:1, 3
banc 26:23
bank 13:16; 64:21, 23;
66:1, 12; 79:11; 85:12;
104:15; 115:20
bank's 65:20, 21
banks 55:4; 104:12
based 67:18; 89:10
basic 18:10; 67:21
basically 24:1; 32:11
basis 26:13; 64:11; 74:2;
86:1; 87:4; 97:15, 16
Beamer 22:3; 55:9, 12;
64:12, 14, 17; 65:16, 18;
68:21, 24; 82:17; 99:18
bear 11:19; 101:2
become 55:23
becoming 55:21; 83:18
beg 95:19
began 5:2
begin 52:23

beginning 24:18; 51:14;
63:1; 73:24; 111:22
begins 41:4
begun 56:9
behalf 46:9
behalf 52:9; 120:9
behind 26:20; 32:4
belief 31:4
bench 127:22
benefit 52:24
best 28:11
better 32:18; 99:21
beyond 39:18; 51:13
biggest 84:
bit 54:1; 67:9; 93:12
Block 7:7; 9:10, 16; 11:3,
19; 13:2; 17:14; 20:24;
21:10, 20; 23:12; 34:24;
37:8, 15; 39:21, 22; 40:19;
45:10; 49:12, 13; 51:20,
23; 54:10; 62:4; 63:13, 14,
22, 23; 80:20; 86:20;
89:12, 16; 90:2; 98:17;
99:9; 101:2; 102:8; 103:6;
111:16; 118:15
Block's 7:24; 10:4, 14,
19; 11:7, 21; 15:22; 19:20,
21; 20:18; 26:6; 28:2, 4;
30:19; 32:20; 33:21; 48:5;
51:15; 90:8; 98:9; 99:1;
100:7; 102:19; 108:9
Blocks 49:2; 59:5
Board 11:5; 19:17, 19;
26:18; 51:19; 62:12, 18,
21, 22; 63:1, 3; 67:4; 99:5,
12, 13, 14, 15; 120:5
boat 99:11
body 10:12
boggling 85:17
boiling 104:15, 16
bone 91:13
bones 65:14
both 7:9, 18; 10:22;
17:20; 31:1; 32:16; 41:10,
22; 56:16; 62:14, 15; 67:3;
81:10, 12; 114:11
bottom 41:8, 18
box 91:21
boxes 40:20; 91:16
brackets 21:12
brief 20:9; 21:11, 22;
30:19, 20; 31:14; 33:18;
34:24; 38:3; 39:22, 23;
49:20; 52:5; 66:24; 67:2;
68:20; 83:21; 88:22
briefed 6:17
briefing 21:10; 118:18
briefs 131:18
briefs 12:22; 13:4; 18:9;
23:13; 24:2; 26:17; 37:5;
49:11; 68:19; 99:7; 108:10
broader 74:20
broker 13:17, 23
brother-in-law 113:5, 20
brought 80:23

Budde 37:21; 48:2
burden 9:11; 37:16
business 79:14, 15;
124:6
business's 84:
button 51:2; 108:2;
110:3, 23; 113:16; 114:22
buttressed 74:17

C

CAFC 77:8
cake 77:22
calculations 32:2; 54:17,
22; 66:21
calculator 65:8; 118:21
call 131:18:21
call 19:22; 92:2; 102:13
called 14102:13
called 1702:13
called 91:2, 3
calling 101:12
calls 30:15; 90:23; 91:2;
101:14, 14, 17; 102:12
can 13:10, 18; 17:21, 22;
20:11; 30:11, 21; 31:10,
15; 37:2; 40:20; 41:20;
49:7, 18; 61:7; 64:24; 65:5,
21; 66:4, 10; 68:5, 6;
80:20; 82:3, 4; 85:24; 86:2,
5, 15; 89:4, 8; 93:6, 17;
97:18; 102:13, 15, 18, 19;
108:20; 111:23; 113:7, 13;
115:3; 120:24; 128:4, 8
capable 54:24; 94:24;
95:4
capacity 49:21
capital 65:22, 23
care 113:7
carrying 75:20
case 55:20
case 11:20
case 5:2, 11; 6:2; 11:7;
12:21; 19:15, 16; 26:16,
22; 28:15; 33:8; 34:20;
35:2; 37:22; 39:10, 11;
40:3; 45:12; 46:11; 48:2, 3;
56:13; 61:23; 62:1; 63:19;
67:11, 14, 20; 68:13, 16;
73:11, 12; 74:7, 8, 22;
75:7, 7; 91:20; 92:13, 14;
99:23; 101:1; 103:11, 12;
124:23; 127:23
cases 5:1; 42:23
category 71:11
caught 81:1
causing 38:7; 42:6; 48:12
caution 26:20
centers 9:15
certain 87:1, 3; 118:23;
119:
certainly 17:5; 49:9;
86:11; 89:4; 91:20; 94:6;
98:18; 99:4; 102:2; 115:7

cetera 18:15
chair 111:23
change 32:3
characterize 119:
characterizing 67:16
charitable 15:15; 80:12;
81:3; 82:1
charities 13:23; 81:20
charity 80:24; 81:2, 15;
83:4; 85:14
chart 71:19; 77:2
charts 91:3, 9
checking 18:3; 111:2
choice 17:11; 34:11
chooses 17:15
circa 49:17
circle 13:13, 18
circles 40:20
Circuit 11:2; 19:7; 26:20,
23; 37:22; 75:8, 16; 100:2,
9
circuitry 46:13
circuits 35:20
cite 33:7
cited 19:17; 21:21; 24:10;
26:17; 75:22
cites 20:18; 21:1, 17;
28:23; 92:22
CitiBank 103:4
City 127:14, 16; 128:3,
13, 13
claim 9:1, 3, 9; 10:4, 12,
22; 12:15; 15:9; 18:11;
19:5; 24:3; 26:1, 10, 14;
28:12; 33:4; 34:1, 11; 36:3,
6, 15; 37:19; 40:22; 45:23;
51:11, 15; 67:12, 21;
68:15; 71:15, 17, 17, 20;
77:3; 82:10; 83:17; 89:14;
90:7, 13, 14; 95:21; 97:3,
12, 13, 13, 24; 98:1, 2, 3,
16, 21; 102:8; 110:18;
111:12, 13; 115:2, 6, 12,
13; 118:16, 19
claimed 6:12; 38:15;
39:7; 40:18; 45:20; 75:20;
111:15
claiming 75:14
claims 165:14
claims 22:14
claims 6:15; 7:5, 6, 8, 17;
9:6, 14; 10:8, 12, 21; 12:7,
17; 13:6; 15:11, 16, 19;
17:1, 2, 10; 21:1, 3, 12, 24;
22:1, 3, 15, 17, 20; 23:1, 9,
14, 18, 20; 26:13; 34:10;
36:5; 37:13, 14; 55:11;
61:9, 20; 64:4, 9; 68:10;
74:10, 14, 16, 19; 75:4, 12;
77:7, 9; 89:19, 21, 23;
90:7; 92:8; 95:18, 20; 96:1,
20; 98:11; 100:4; 101:5;
104:22, 24; 108:11;
114:18; 115:5, 10, 12;
118:6, 22; 119:
clarified 20:21

clarify 35:7; 124:19
clean 19:1, 4
cleaning 18:12
clear 9:10; 12:8; 21:8;
23:23; 26:11; 28:10, 18;
30:24; 33:4, 15, 20; 34:3;
37:16, 20; 39:4, 12; 49:1;
61:3; 67:12; 68:5, 15; 74:1;
82:9; 94:7; 101:10; 103:3;
115:4, 23
clearly 67:16; 122:13
click 110:3; 120:6
clicking 55:14
clinging 99:8, 10
Close 75:14
closely 94:19
code 38:6; 40:8; 42:5;
46:21; 48:11; 75:6; 86:4;
91:12; 120:16
collect 41:21; 59:12;
80:1; 91:16; 92:18; 94:22
collected 95:1, 4, 9;
96:10, 13, 18, 22, 24;
104:10; 108:18; 115:19
collecting 24115:19
collecting 21:4; 23:3, 7,
10; 38:1; 39:24; 41:11, 22;
42:2, 13, 15; 45:8; 68:18;
79:21; 90:5; 96:7; 101:19;
108:14; 119:
collection 59:8; 81:21;
94:20; 99:19; 119:
collects 41:14; 45:16;
108:7; 120:22
CollegeNet 19:16; 34:19;
35:2
CollegeNet's 24:11
column 41:4, 5, 9; 55:18,
22; 56:2, 10, 19; 57:12;
59:10, 22; 71:5; 81:8, 9;
92:20, 21; 93:13, 13, 15,
16; 95:22
columns 45:7
coming 79:23; 80:10, 14;
86:6; 113:22; 119:
comment 81:15
comments 82:8
commercial 102:3, 5, 14;
103:1
commercially 5:6; 30:14,
16; 46:3, 8, 14; 48:4, 19;
49:20; 92:2; 93:21; 101:12
common 73:24
communicate 65:19
community 42:17
companies 54:9; 55:4
company 6:4
compared 74:5
complete 51:8
completed 9:17; 34:18;
35:16; 49:3, 5, 13; 54:5,
17, 23; 88:7
completely 66:21; 90:10,
11; 120:11
completing 66:14

completion 51:13
complex 56:7; 86:17;
104:20
complicated 77:23;
80:19, 21; 84:
comport 34:7; 83:4
Composites 68:7
comprising 10:8, 9, 13,
15; 12:6, 8, 8, 16; 13:10;
15:9; 18:13; 19:5; 34:10;
35:4; 96:3; 98:14; 108:21;
110:9; 111:17, 18
computations 66:16, 18,
20; 108:17
compute 55:19; 118:3
computer 16118:3
computer 2318:3
computer 32:4; 38:5, 6,
12; 40:3, 9; 42:5, 9, 20;
46:21; 48:11; 49:2; 54:11,
14, 16, 20, 21; 59:15;
61:24; 65:20, 22; 66:15,
19; 75:15; 91:7; 93:7, 7;
95:8; 103:16; 113:14;
115:18
computer-calculated
100:12
computers 6:9; 66:4
computes 108:19
concede 30:20
concept 5:13; 108:23
concession 98:22
conclude 7:20
conclusion 51:15
conducted 67:4
confused 20:11
connect 5:14; 38:7; 39:2;
41:20; 42:22; 66:10; 79:2,
22; 92:18
connected 108:6; 115:17
connecting 21:4; 22:4,
10; 23:3; 36:24, 24; 38:16,
19; 39:24; 40:23; 41:2, 11,
22; 71:23, 24; 77:17, 20;
85:12, 12, 14; 90:5; 96:3;
101:19
connection 87:1, 14;
122:22
connections 80:5
connects 45:15; 108:4
conscious 17:11
consider 42:14; 51:8;
77:7; 90:1; 98:7, 24
considerable 32:17;
90:21; 91:19, 23; 100:1
consistent 24:1; 33:23;
34:12; 35:23; 36:5;
111:18; 127:24; 128:7, 7
construction 7:13, 16;
9:17, 21; 10:14, 19; 11:5,
21; 19:14; 24:3, 17; 28:12;
32:20; 33:4, 22; 34:3, 22;
35:12, 23; 36:10, 21; 37:3;
51:11; 102:8
constructions 10:5;

15:22; 28:2, 4; 34:1, 6;
36:6; 49:9; 51:16; 103:24
construe 9:1; 36:13;
37:9; 92:8; 98:15; 114:15
construed 61:21
contact 13:16; 82:3
contacted 81:21
contacts 45:15
contained 18:9
contention 92:6
context 6:9; 7:2, 4; 11:16;
20:7, 15, 15, 17, 20; 21:10,
14; 23:6; 51:24; 56:12;
62:3, 5, 7, 8, 11, 13, 16, 21;
83:19; 89:18; 90:6, 13, 15;
98:7, 24; 99:7; 101:13;
115:3
continuation 20115:3
continuation 63:18, 22;
64:10
continue 81:18
Continuing 74:7; 120:5;
128:17
contrary 35:1; 90:10;
98:9; 102:9
contrast 34:7; 100:13
contribution 15:15
control 51:5
convenient 66:1
convincing 9:11; 37:17,
20
copies 30:5, 5; 88:24;
89:2, 5; 100:19
copy 6100:19
copy 31:13; 52:15
core 7:15; 17:1; 19:5;
36:9
corresponding 7:22;
36:16; 38:2, 3; 48:10
counsel 848:10
counsel 11:10; 15:12;
20:3; 52:15; 89:1, 6;
124:21
countered 20:21
country 56:7
couple 21:15; 56:19;
88:21; 90:17; 92:15;
114:10
coupling 38:8
course 9:4; 12:23; 13:21;
15:24; 20:10; 33:12;
48:10; 79:4; 91:10; 93:1;
95:24; 98:6; 115:15
COURT 9115:15
Court 6:19, 23; 7:19; 9:1,
23; 10:9; 15:14; 31:12;
34:19; 36:14; 37:9, 18;
52:3, 6, 15, 16, 21; 54:1;
61:24; 62:7; 67:7; 73:23;
74:8, 13; 77:7; 82:24;
83:12; 84:; 85:4; 86:18;
87:21; 88:1, 17, 20; 89:2,
3; 113:3, 11; 114:7, 22;
119:; 120:1; 122:20;
124:9, 15, 19; 127:3, 11,

20; 128:10, 18, 22, 23
Court's 95:19; 102:11;
124:21
covered 71:15, 16;
97:11, 12, 24; 98:1
crafting 20:8
creditor 115:24
critical 40:7; 90:16
crucial 62:23
crusted 18:22
crux 5:8; 22:14
cull 30:13; 92:23
culled 94:14
current 30:11; 59:11, 13;
93:18; 94:18, 21; 95:5
currently 93:8
Curtin 33:8
CURTIN 10:8
Curtin 62:3; 87:6; 88:19;
104:2; 113:9; 114:6, 9;
115:1; 119; 122:18, 21;
124:7, 13, 17; 127:11, 11;
128:15, 21
custom 74:4

D

D 65:23
daily 85:6
data 245:6
data 5:10, 14, 15, 16, 17,
18; 13:12, 14, 14, 22;
28:22; 30:2, 6; 31:22; 32:3,
5, 24; 38:4, 13, 22; 41:14,
15, 21, 23; 42:4, 6, 10, 15,
18, 22, 23, 23; 45:15, 17,
17; 46:20; 54:14, 21; 55:4,
19, 20; 59:7, 9, 13, 14, 18,
19; 61:1, 3, 4; 65:7, 24;
68:22; 71:23; 73:1, 1, 2, 5;
77:20; 79:8, 9, 23; 80:1, 6,
7, 9, 14; 81:22; 85:8, 17;
86:6, 8; 87:7; 88:13; 91:17,
17, 17; 92:18; 93:4, 5;
94:20, 22, 23, 23, 24; 95:3,
7, 8, 9, 10; 96:5, 8, 8, 8, 10,
10, 11, 13, 14, 15, 18, 19,
21, 24; 98:12; 99:17, 19;
100:19; 104:1, 2, 3, 6, 9,
11, 14; 108:8, 12, 18, 19;
110:1, 11, 13, 16; 115:18,
19; 119; 120:21, 22, 22;
122:8
dated 66:8
David 5:4
day 64:18
dead 62:15, 20
deal 9:19
dealing 17:23
dealt 49:11
decided 75:8
decipher 102:14, 15, 19
decision 99:12, 15
deductions 15:7; 80:12;
81:4; 82:1; 113:15

deep 57:22
default 128:19
defeat 63:8
defeats 48:5
defendants 52:10
define 17:2; 21:7; 34:15;
36:14; 96:1
defined 104:3
defines 28:14
definition 7:7; 9:13; 10:7;
24:7, 11, 15; 35:2; 36:2;
90:2, 12; 92:7; 99:17;
103:23
definitions 24:1, 5, 16;
34:23
definitive 67:24
Delaware 124:20; 128:5,
20
Dell 62:1; 67:14
depart 11:22; 26:13
departure 12:1
depend 68:3
depends 115:2
depositions 102:20;
124:22, 22; 127:15, 18
describe 41:16; 88:2;
122:4
described 57:4; 92:10;
93:2; 95:1; 118:10
describing 31:17; 91:5
description 39:6; 40:11,
15; 45:1, 19; 56:17; 91:18;
94:7
design 74:4
desk 122:6
desperate 79:22
detail 139:22
detail 45:1; 59:2; 94:1;
102:23; 103:9
detailed 39:6; 91:10
details 102:1, 2, 24
determine 5:10
determining 35:13; 56:4;
104:4
device 66:19
devices 17:19; 34:4;
35:20, 21; 38:19; 39:2
diagrams 40:20; 91:3, 4,
8
dictionary 24:5, 16;
34:23; 36:1
difference 10:20; 15:23;
110:7; 111:14
different 10:21, 23; 11:1;
17:13; 20:9; 36:20; 61:22;
79:13; 85:16, 20, 21;
92:20; 100:22; 103:18;
114:10, 16; 115:20, 23;
118:7
differently 127:2
difficult 127:13
dinner 18:13
directly 64:21; 65:20, 21;
73:13

disavowal 23:23; 67:13;
68:4, 15; 82:10; 99:5
disclaimer 67:10, 22;
68:2
disclose 9:3; 28:8; 61:16;
75:10; 99:19
disclosed 37:11; 75:18;
101:8; 102:23
discloses 15102:23
discloses 2202:23
discloses 9:8; 41:1; 45:8;
46:24; 48:17; 108:23
disclosure 28:5; 46:15;
101:16
discuss 128:17
discussed 24:12; 41:23;
45:14; 73:9; 97:9
discussing 41:9; 91:24
discussion 23:20; 41:6;
73:16
dishes 18:12, 14, 15, 17;
19:1
dishwasher 17:18; 18:8,
14, 16, 19; 108:1
dispute 6:15; 7:15; 9:12;
36:9; 39:1; 89:15; 127:3, 9
disputes 36:18
dissimilar 66:4, 5
distant 64:19
distinction 68:6, 14
distinguish 17:15
distinguishes 28:6; 68:3
distinguishing 74:3
district 74:13
dividends 13:17
Docking 62:1
document 39:12, 17
documents 83:23;
102:13, 15, 20
Dollar 65:22
Dollars 66:13
donated 81:14, 19
donations 15:3, 6
done 51:13; 55:15; 83:18;
86:10; 89:6; 101:22;
122:16
door 85:15
down 13:19; 41:5; 79:14,
15, 23; 86:7; 87:18; 88:23;
93:12, 13; 104:13, 15, 16
download 42:23; 64:22;
66:11
downloaded 66:13;
102:17
dozen 85:20
Dr 13:4
draw 24:23
draws 24:18; 35:5
driving 56:6
drudgery 65:23
dumb 128:8
DuPont 113:5, 6, 12
during 67:13; 68:1;

74:17; 87:20

E

E-filing 48:22; 49:23; 101:16
E-mail 108:10; 118:20; 119:,,
e.g 66:10, 12
earlier 62:2; 67:15; 77:12; 92:23; 98:8
early 31:16
earned 87:12
easily 66:3
easy 31:9, 19, 20; 86:10
effect 12:9; 35:4; 36:3
eight 24:5; 95:22
either 20:19; 51:23
electronic 5:19; 7:13; 9:13; 15:5; 33:15, 22; 34:1, 2, 4; 35:21; 38:9, 11, 12, 22; 41:13, 15, 19; 42:7, 8, 10, 21; 45:14, 16; 46:23; 48:13, 14, 16, 17; 49:6, 14, 16, 24; 51:12; 55:2; 56:9; 59:3, 6, 8, 17, 24, 24; 61:5, 7; 65:3; 66:17, 19; 68:23; 73:4; 81:19; 87:14; 88:13; 91:22; 93:3; 94:20; 96:2, 4, 17; 110:12; 114:2; 120:23; 122:1, 9
electronically 5:11, 14, 15, 17, 20; 7:4, 11, 11; 9:22; 10:6; 11:6, 24; 19:22; 20:20; 21:1, 4, 5, 7; 22:4, 5, 10; 23:3, 4, 8, 10, 24; 28:9, 23; 30:3, 7, 22; 33:1, 10, 11, 15; 34:7; 35:19, 20, 23; 36:1, 21, 23, 24; 37:1, 1, 2, 4; 38:1, 7, 16, 19; 39:2, 24; 40:1, 24; 41:2, 11, 12, 14, 20, 21; 42:3, 13, 16; 45:9; 46:18, 19; 48:9; 49:10, 22; 55:21; 59:19; 64:21; 65:5; 66:10; 68:18; 71:23, 24; 73:4; 81:6, 21; 82:1, 4, 8; 89:18, 22; 90:4, 5, 6; 93:4; 94:24; 95:4, 9, 14; 96:4, 7, 9, 10, 12, 16, 22; 97:1; 99:15; 101:20; 104:10, 11; 108:15, 17; 110:6, 12; 113:8, 13; 114:21, 22; 115:18, 19; 118:2, 4, 23, 24; 119:; 124:1
element 111:12; 115:15
elements 15:10
elevn 6:8; 39:3
eliminate 10:15; 30:4
eliminates 59:11, 13, 16; 94:17, 21; 95:5
Elmo 31:11; 32:18; 41:8; 45:6; 89:2; 90:19
else 5:23; 24:23; 81:23
elsewhere 20:21
embodiment 32:21; 33:5

embodiments 61:16; 102:6
emphasize 92:15; 100:15
employ 28:16
employer 79:11
employers 64:20
en 26:23
end 59:5; 63:6; 104:21
ended 98:14
Endo 67:10
engaging 120:14
Engineering 67:20
engines 46:1
Engle 52:10
enough 9:3, 8
enter 5:12; 15:6; 59:14; 95:6
entered 54:15, 21
entering 17:24; 32:14
enters 31:22
entire 62:8
entries 98:12
entry 13:12, 22; 15:14, 18; 57:3; 100:17
environment 102:12
equally 97:20
equate 85:2
equivalents 75:13
erase 68:14
error 88:8
errors 86:14, 16
essentially 12:10; 46:20; 103:15
establish 38:8
established 80:6
et 18:15
even 12:24; 13:1; 18:7; 21:9; 26:6; 30:9; 65:12; 73:9; 88:11; 98:15; 100:10; 128:11
everyone 18:5; 79:3
evidence 37:17, 21; 67:23; 87:21
evidentiary 33:7
evolution 54:2, 19
exact 36:19; 56:16; 87:2
exactly 9:16; 15:13; 19:13; 49:2; 81:10; 85:1; 128:10
exalt 74:22
examination 11:13
examiner 64:3, 8; 66:7
example 13:15, 23; 15:2, 17; 26:19; 30:14, 16; 32:21; 40:19; 42:17; 66:3; 67:16; 75:24; 77:16; 81:12; 94:2; 100:15; 103:13; 115:5; 119:
examples 17:16, 19; 21:16; 28:7; 38:11; 42:8; 48:15; 87:13; 104:5, 8, 8; 108:9

except 83:3; 114:2; 115:6
exclude 22:13; 32:21
excludes 33:5
excluding 98:11
excuse 59:6; 71:20
executed 66:15
executive 127:12
exhibits 52:19
existed 5:11
existence 62:20
expense 119:
experienced 39:15
experiment 87:17
explain 15:1
explanation 84:
expressed 21:13
expressly 12:19; 28:14; 30:10; 49:15; 98:9
extensively 6:18
extent 5:16; 86:20; 100:1; 101:6; 102:10, 15, 18, 19; 114:12; 115:7, 9
extremely 86:17
eye 81:1

F

facility 86:3
facing 103:19
fact 7:5; 18:23; 24:4; 30:13; 31:2; 33:14, 21; 48:21; 57:10; 61:7; 68:13; 73:15; 91:22; 92:1; 93:4; 98:13, 23; 103:3, 8; 118:23
facts 74:22
fail 51:16, 18
failed 75:19; 87:17, 24
fair 127:24
fall 115:11; 118:14
falling 115:10
falls 100:17; 114:18; 118:10, 11
falsity 118:17
familiar 54:5; 61:24
fantastic 128:16
far 5:23; 34:24; 103:9
farther 93:12
fashion 82:21
favor 12:4
feature 103:16
February 63:17, 21
fed 65:21
Federal 11:1; 19:7; 26:20, 22; 37:22; 49:23; 75:8, 16; 100:2, 9
felt 5:22
few 17:9; 56:3; 57:6; 86:5; 87:4, 6, 13, 20; 88:21; 89:7
Fiber 68:7
Fidelity 103:5
field 39:13, 15
fields 32:14

fifteen 124:10
fighting 62:17
figure 31:10; 41:19; 57:18, 19; 65:15; 71:20; 77:1; 102:21
figures 65:15; 90:22, 24; 104:17
figuring 104:14, 19
file 49:22; 61:7; 65:5; 68:22; 110:24; 115:11
filed 5:20; 6:1, 7; 67:2
files 89:5
filling 37:1; 48:8, 17; 49:8, 10; 55:2; 65:12, 13; 101:17; 110:21, 24; 115:7, 13
fill 51:4; 87:16
filling 54:6
final 11:20; 64:4, 6, 9; 103:22
Finally 56:8; 59:23
finances 85:1
financial 55:5; 64:23; 66:11; 84:
find 91:8, 8
fine 46:4; 119:
fingers 119:
fingertips 54:15
finish 100:12
finished 73:21
first 143:21
first 20:21
first 7:20; 9:20; 10:6; 12:7; 15:24; 20:23; 28:21; 36:14; 39:21; 49:1; 52:23; 61:6, 9; 62:8; 82:22; 85:22; 89:9; 90:20; 92:15
five 41:5, 9; 45:7; 56:15; 81:9
flat 124:9
flatly 98:20
flavor 99:21
flip 122:16
flow 91:3, 9
focus 6:24; 23:19; 37:8
focused 90:3, 4
focuses 9:13
focusing 22:1; 71:6; 98:4
follow 91:14
following 12:11; 77:13
food 128:15
foreclose 108:22
form 13:16; 32:13, 13; 51:3, 4, 7, 8, 9; 68:24; 80:8, 9; 85:3, 7; 86:14; 87:8, 16; 88:7; 110:15; 119:
format 7:19; 79:2, 3; 103:5
forms 31:9, 23; 32:10; 80:17
forth 1280:17
forth 22:22; 32:22; 40:5; 91:11; 97:2

forty-five 11:9
forum 127:1
forward 97:18
found 73:11; 74:11; 80:16; 82:5; 88:10; 100:3, 9; 103:10
founded 6:3
four 9:18; 10:3; 41:4; 45:7; 81:8
fourth 9:12; 11:20
fragile 18:18
frustrating 77:15
frying 18:21, 23
full 1223
full 20:6, 15, 16; 35:4; 36:3; 83:2, 14
fully 10:14, 20; 11:23; 15:23; 17:3, 7, 11; 18:7; 26:4; 28:7, 19; 31:6; 32:20; 56:18, 21, 22, 24; 57:1, 11; 61:5, 12, 13, 15, 18; 62:9, 10; 73:18; 81:5, 6; 82:20, 21, 23; 83:16; 88:4, 7; 92:7, 9; 94:2, 4, 6, 12; 101:11; 110:7; 111:16
fully-automated 57:17
function 7:16, 18, 20, 21, 23; 19:9, 11; 24:13, 14, 19, 20; 36:11, 13, 15, 17, 19, 22; 37:10; 39:8; 40:13, 19, 22; 45:3, 20; 46:6, 16; 48:7; 67:23; 75:4, 16; 77:6; 97:23
functional 37:2; 75:14
functions 34:17; 35:16; 75:21; 101:5
further 63:5
future 64:19

G

gather 42:6
gathered 95:14
gauge 20:12
gave 15:2; 92:22; 119:
general 38:5; 42:5; 48:11
generate 54:17; 55:7
generated 54:22; 119:
gentleman's 5:4
Georgia-Pacific 12:21
gets 55:8; 79:19; 118:20
given 23:16; 33:11; 45:5; 79:18; 94:6; 98:19; 104:8; 110:4; 115:23
gives 11:19; 35:3; 36:3; 40:17; 42:24; 65:24; 111:3, 5
giving 31:8; 127:12
glasses 18:18, 24; 19:3
global 10:3, 18; 11:20
goes 41:4, 16; 57:20; 90:9; 93:11; 108:4; 120:19, 21; 122:13, 17
Good 217

good 23:17
government 84:
grab 42:23
GRAHAM 128:9
granted 63:16; 64:1, 2
great 94:1; 128:6, 14
grounds 114:1
guess 99:1
guide 28:12
guides 31:20

H

H 54:10
hand 64:10
hand 18:20, 24; 54:5
handed 88:24
handle 79:19
handled 97:1
happen 114:17
happens 41:17; 127:21
happy 6:22
hard 20:12; 100:19;
128:11
Harley-Davidson 37:22
Harris 40:2; 45:11;
103:11
Hawkins 12:24
head 98:20
heads 23:16
health 113:7, 14, 15
hear 64:13; 87:21
heard 56:1
hearing 20:15, 16; 21:20;
26:19; 34:12; 51:19; 62:4,
13, 16, 21, 22; 63:1; 67:3;
71:1; 80:23; 81:2, 8, 23;
82:2, 9; 83:4; 97:8; 120:5
Heart 15:3, 4, 14; 80:24;
81:1, 15, 16, 16; 82:3; 83:3
heating 63:4
heavy 12:3; 28:15
held 75:17; 127:1
help 5:19; 83:20
helpful 26:10; 124:2, 12
Hence 94:19
high 74:3
highlighted 11:14;
15:13; 56:15, 17; 61:2;
64:17; 73:6; 122:23
highlighting 89:3
highlights 21:21
highly 33:6; 91:10
himself 5:5
hinge 37:3
hinges 36:20; 99:17
historically 56:21
history 26:12, 21, 24;
34:9; 61:18; 63:11; 74:21;
100:4
hit 51:1; 99:23; 101:6;
103:2; 110:3, 23; 114:22

hits 100:18
hold 82:24; 127:5
home 54:14, 20; 66:12
Honor 166:12
Honor 26:12
Honor 5:12
Honor 1012
Honor 5:1, 8; 6:15; 7:2,
24; 9:5, 13; 10:4, 6; 11:6,
16; 12:1, 6; 13:3; 15:22;
18:9; 19:7, 12, 19, 24;
20:19, 24; 21:10; 22:16;
23:16; 26:7, 18; 28:21;
30:1, 8, 24; 31:19; 32:2,
11; 33:3, 19; 35:12; 36:8,
14, 20; 38:14, 18; 39:5, 11,
19, 22; 40:6; 41:3, 9; 42:3,
11, 18; 45:5; 46:12, 18;
48:9, 17, 23; 49:1, 4, 18;
51:3, 15, 18; 52:1, 8, 12,
18, 23, 24; 55:16; 57:23;
62:2; 64:15; 67:6; 71:7;
73:11; 77:5; 83:1, 10; 84;
87:2; 88:20, 22; 89:8, 11,
24; 90:18, 20; 91:16, 23;
92:5, 12, 22; 93:11, 20, 24;
95:2, 18, 22; 96:20; 97:4,
9, 21; 98:17; 99:22;
100:14; 101:3, 20; 102:5;
103:13, 21, 23; 104:24;
110:22; 113:2, 10; 114:11;
115:1; 119:, 120:18, 24;
122:19; 124:8, 14, 17;
127:7, 11
house 113:4, 19, 22;
114:5
huge 88:11
human 66:22; 100:11
hundreds 85:20; 102:16,
17

I

i.e 81:15
idea 5:2, 2, 7, 8, 21; 39:23;
122:12
identical 21122:12
identified 38:2, 3; 46:7
identifies 48:19
identify 7:21, 22; 36:16
identifying 45:13
ignore 10:20; 15:23;
19:22; 21:14; 28:3; 74:21
illustrate 90:19
illustrative 41:19
implement 30:17
implementation 102:3,
24; 103:1
implemented 30:11;
40:3; 75:15; 93:6, 18
import 55:4; 86:9; 87:8
important 20:13; 28:1;
32:1; 38:17; 39:5; 56:12;
57:3; 65:10; 67:8; 77:9;
89:10; 98:24; 100:9;
102:3; 103:1; 108:22;

115:4; 120:19
imported 7:8; 55:6;
88:13; 89:21
imprecise 20:1
imprecision 19:23
improvement 103:13
inappropriate 7:9
Inc 93:10
include 12:7; 23:18;
39:12, 17; 61:8
includes 38:4; 41:10
including 9:16; 12:10;
38:11; 42:9; 92:1; 101:13
Income 55:20; 113:22
Inconsistent 28:4; 97:5
Incorporate 74:10
incorporating 100:16
increases 65:24
increasing 55:17, 19
increasingly 55:21, 24
independent 21:23;
22:20; 23:18; 61:9
indicated 74:20
indication 57:9, 10
indicative 66:17
individual 91:16
individuals 10:22
indulgence 95:19
information 13:19; 32:7,
14; 45:13; 59:20; 65:1;
66:1, 3, 11, 13; 83:24; 84;
,, 91:7; 104:4, 6, 7, 20;
108:7; 115:21; 120:18;
122:2
infringe 15:17; 108:11;
118:10, 22
infringement 63:13;
83:19; 115:8
infringers 61:23
infringing 83:19; 86:19
Inherent 19:23
initial 6:6; 57:7; 92:14
initiate 17:21; 24:19;
32:8; 71:4, 4
initiated 19:9; 24:13;
34:17; 35:8, 16; 110:5
initiating 57:4; 71:11
initiation 57:6, 8; 71:1,
14, 21; 88:15; 97:11, 22;
111:11; 120:14
input 22:6, 14; 61:16;
68:19; 71:10, 14; 73:8, 9;
85:8; 97:10, 22; 110:4;
111:1; 119; 120:7
inputs 111:6, 7
inputting 82:13
instances 56:19; 86:11;
88:12
Instead 40:10; 54:23
instructions 77:20; 79:6
Insufficient 37:18; 48:6
integration 83:24; 84:
intend 40:17

intended 94:16
interest 80:11; 87:11, 12
interested 89:4
interesting 56:23; 81:7
Interferences 67:5
intermediary 34:2;
41:14, 20; 42:21; 45:14,
16; 59:6, 18, 24; 81:19;
85:19; 93:3; 96:3, 4
Intermediate 30:5
Internal 51:6; 79:10, 12
internet 38:22
interpretation 26:6, 11;
67:21; 83:18; 98:10; 99:1
interpretational 56:3
interpretations 98:19;
99:9, 10
Interpreted 19:8; 68:10
interpreting 74:13
interrupt 17:22; 83:13
intervening 12:19; 18:4;
110:8; 111:18, 20
Intervention 17:20; 32:8,
17; 34:18; 35:17; 49:8;
71:2; 83:8; 87:9; 88:15;
92:10; 93:2; 94:8, 9; 97:19;
100:6, 16
Interview 31:19, 20
into 55:5, 6, 8; 57:5, 22;
59:15; 63:9; 64:21, 23;
65:22; 68:23; 74:10;
80:16; 86:3, 3, 9, 15; 87:8,
15; 88:13; 89:21; 95:7;
118:2, 4, 14; 119:
intrinsic 67:23
Introduction 11:15
Intuit 93:10
invalid 9:6, 7; 37:13;
62:20; 103:11
invention 6:12; 17:2;
30:18; 39:14, 16; 40:4;
56:14, 20; 57:13, 14, 15;
59:11; 61:12, 14, 15, 19;
67:17; 68:4; 73:19; 74:3;
93:6; 94:16, 17, 21; 96:1;
110:13, 17
inventor 5:3; 63:2, 6
inventor's 63:3; 74:2
Inverness 26:16
Investigated 5:22
involve 55:13
involved 7:21
Involves 74:15
IRS 13:15; 48:18; 49:22,
24; 51:3, 7, 7; 54:18; 55:1;
56:9; 65:6; 85:2; 101:16;
104:12; 113:17; 115:11
isolation 118:17
issuance 63:9; 99:3
issue 119:3
Issue 22:15, 17, 21;
37:16; 49:12; 67:9; 85:8;
99:16, 20, 21; 103:10;
113:23; 124:18
issued 26:21; 63:19;

64:7, 9; 100:23
issues 6:17, 20, 21; 9:18,
20, 23; 37:3, 7; 56:4; 64:4;
85:10; 99:11; 101:4;
113:6, 12
item 119:
itemized 15:7
items 81:14
iterative 108:20

J

Jan 64:19; 65:2
January 64:8; 66:8
Jeff 52:9
Jim 64:19; 65:2
Judge 20:3; 22:12; 71:9,
13; 98:10; 120:3
judges 11:11; 22:22
judicial 38:21
July 63:14
June 63:24; 64:3
Jurisdiction 127:5
justify 90:14

K

Kansas 127:13, 15;
128:2, 13, 13
Karen 52:11
keep 84; 85:6
keyboard 54:16; 119:
kick 111:21
kicks 108:1, 5; 110:5, 22;
111:8, 11; 113:1, 12
kid 128:7
kind 22:14; 24:22; 73:15;
80:15; 99:21; 110:1;
115:13; 128:4
kitchen 54:6
knock 85:16
known 39:13; 55:1
knows 46:10

L

Lairam 68:12
lake 113:4, 19
language 17:1; 26:14;
34:11; 36:3; 92:24; 94:19;
95:24; 100:19; 108:21;
111:17; 122:22
large 102:14
last 15:3; 48:7; 80:11;
101:3
later 6:3; 30:3; 65:13
law 9:9; 26:11; 28:10;
33:4; 39:4, 11, 19; 40:10;
67:9; 91:11; 92:3; 93:20;
96:6; 102:22; 103:7
laying 33:17
lays 91:13

lean 111:23
least 12:11; 98:6; 110:16
leave 6:19, 21; 18:22;
127:13
Lee 22:13; 71:9, 13
left 73:6; 77:21; 80:15
legal 12:9; 42:17, 24;
56:3; 86:15
legible 31:12
less 87:3
level 74:4; 86:1
levels 55:17
Lexis 42:18
liability 5:10; 35:14;
55:20; 56:4; 104:5; 118:3
lie 68:5
lien 64:24
life 10:23; 17:16; 62:17,
18; 99:10
lifetime 6:8
light 11:17; 22:7; 61:11;
74:14
likely 79:13
limit 23:14; 26:12; 67:11
limitation 22:10; 36:11,
13, 15; 37:10; 38:15;
42:13; 45:23; 46:16; 48:8;
98:2
limitations 7:6, 17; 9:4,
10; 12:11, 13; 21:3; 26:2;
36:20, 23; 37:19; 74:10;
89:14; 90:7; 97:3
limited 6:18; 12:10;
75:12, 21; 100:4
line 24:18, 23; 35:5; 71:6
lines 41:5; 55:22; 56:2;
59:10; 81:8; 93:15, 16
link 33:22; 34:2; 38:9;
42:7; 48:14, 16
links 38:11; 41:16; 42:9;
59:1, 3
listed 111:11, 12
listened 83:20
listening 77:11
lists 38:10; 42:8
little 20:11, 11; 31:12;
40:14; 54:1; 67:9; 84;
93:12, 12; 94:19; 118:7
lives 85:6
LLC 6:3
local 85:13
locations 68:23
logical 38:8
lone 5:3
long 52:20; 113:1
look 21:19; 30:23; 42:22,
22; 46:10; 57:24; 82:11,
12, 13; 91:5, 6; 94:18;
95:21; 103:14; 110:15;
115:15; 118:12
looking 92:21; 118:16
Looks 120:1
lost 20:11; 95:20
lot 6:19, 21; 49:4; 73:16;

86:15; 88:14; 89:12;
101:24; 113:23; 124:4
lots 101:24

M

machine 17:24; 18:6;
24:13; 111:7
machines 17:17; 38:24;
103:14
MacInTax 66:10; 68:23
magically 80:16
mailing 54:23
main 42:21
major 9:12, 18; 113:14
makes 28:17; 33:14;
101:10; 108:17; 115:22;
118:15
making 67:12
man 19:9; 119:
manage 79:17
managed 79:21
manual 13:12, 22; 15:14,
18; 17:20; 19:2; 22:6, 14;
32:17; 34:18; 35:17; 49:7;
55:13, 14; 57:3, 8; 61:16;
68:18; 71:2, 3, 8, 10, 13,
21; 73:8, 9; 82:13; 83:8;
87:9; 88:14; 92:10; 93:1;
94:8, 9; 97:10, 18, 22;
98:12; 100:5, 16, 17;
110:9; 120:4, 8, 9, 11, 13
manually 5:12; 18:4;
19:10; 24:15; 54:14, 21;
59:12, 14; 66:21; 81:4;
82:5; 94:22; 95:6; 108:13
manufacture 57:16
many 56:6; 65:20; 68:6;
87:22, 23, 23; 95:15
March 63:23
Mark 52:10
marked 122:23
marketplace 93:8
matches 34:22; 36:1
matter 31:1, 2; 39:13
may 5:20, 20; 6:23; 13:2,
11, 11; 18:21; 20:3; 35:10,
10; 67:2, 11; 84; 85:24;
88:20; 91:1; 102:10;
104:21, 21; 110:24;
124:18
maybe 13:15; 86:2, 12
mean 18:24; 19:8, 24;
22:14; 49:4, 5, 6, 7; 51:22,
23; 74:16; 89:22; 99:1;
115:2
meaning 10:22; 11:22;
12:4; 23:24; 24:8; 26:4, 14;
28:16; 33:10, 13; 34:8, 15,
22; 35:19, 22; 67:11;
74:19, 23; 75:1; 90:14;
114:19, 20; 118:24
meanings 10:23; 11:1;
17:13
means 7:11, 12, 16, 18,

20; 9:16; 12:9; 13:10; 22:5;
36:10, 13, 22, 23; 37:9, 24;
38:16, 19; 39:23; 40:21,
23; 42:2, 12, 15; 46:1, 15,
18; 48:7, 8; 49:2, 12; 75:3,
15; 77:6, 16; 79:20; 96:5;
101:5
meant 26:3; 65:1
meat 65:14; 91:13
Medical 26:17
medium 176:17
medium 23:17
medium 38:12; 42:10
Medley 120:3
meet 9:10; 15:10, 15;
75:5, 18; 98:2; 118:5
meets 52:14
mention 83:6, 6; 90:18
mentioned 17:9; 55:24;
56:10; 67:15; 81:2, 17;
114:21
mentions 30:2
merit 5:23
met 118:5
method 1618:5
method 228:5
method 18:11, 12; 31:9;
32:10; 57:15; 95:23; 96:1
might 20:8; 86:10; 88:10;
115:24
Miller 5:4, 5, 21; 6:1;
103:9
mind 85:17
mindful 74:9
mine 127:18
minor 6:20, 21; 85:10
minutes 11:9; 88:21
mirrors 35:1; 114:4
misplaced 100:8
mistake 118:15
misunderstanding 13:2
misuses 11:4
modem 38:11; 42:9; 65:4;
77:18
modems 38:23
moment 95:20
momentarily 64:13
moments 57:6
money 18:3; 81:14;
111:4, 5
MoneyLine 65:19
month 114:22
Moore 98:10
more 9:8; 12:12; 30:9;
31:12; 34:17; 35:16; 55:3;
57:2; 64:13; 65:16; 84;
85:10; 87:8; 94:19; 96:5,
24; 103:9, 22; 104:20;
111:24; 122:22
Morehouse 68:12
Moreover 68:13
mortgage 13:17, 23;
80:10; 87:11; 114:22

most 56:5; 92:19
motorcycle 46:1
mouse 110:4; 120:6
move 10:1; 32:12; 36:9;
68:22
moved 113:13
Moving 15:21; 33:9;
45:24; 46:17
much 21:21; 65:15;
88:19; 104:20
multiple 68:4
must 11:18; 12:12; 13:7;
23:4; 24:20; 30:7; 35:8;
36:14; 37:20; 51:16, 18;
68:24; 74:9; 75:17, 18;
77:9; 89:22; 92:8; 128:9

N

name 3128:9
name 5:4; 52:8
names 1252:8
necessarily 20:1, 6;
81:5; 95:11; 102:7
necessary 45:2; 55:19;
84; 96:15; 98:23; 99:2;
102:24
necessity 65:9
need 5:10; 15:6; 18:22;
19:10; 22:7; 24:14; 28:19;
37:8; 39:12; 49:7; 81:20;
93:22, 23; 95:11; 110:1;
120:15
needs 49:6; 82:24; 95:13;
101:21; 108:7
negotiation 63:4
network 38:13; 42:10;
79:5, 10, 12; 85:14
networked 38:24
networks 38:22; 85:12,
13
Next 12:5; 15:20; 19:6,
18; 20:23; 22:11; 23:11;
24:24; 28:1, 13; 32:18, 19;
33:9; 34:5, 14, 21; 35:11,
18, 22; 36:12, 12; 37:23;
38:17; 39:20; 42:11; 45:4,
24; 48:23; 49:14; 54:12,
12, 19; 79:14, 15; 86:8;
100:13
nice 88:8
none 35:1; 61:15; 88:1;
114:2
nor 74:12
Norlan 68:8
normal 128:1
normally 127:1
note 28:2; 34:21, 24
noted 45:5; 46:12
notes 30:10; 49:15; 81:20
notice 38:21; 67:23;
128:3, 3
noticing 128:2
noting 99:6, 20

November 66:24
nowhere 82:5; 100:10
nullify 26:8
nullity 10:16
number 6:13; 7:17;
21:17; 24:2; 51:5, 16; 87:2;
102:14; 120:8, 16
numbers 1216
numbers 120:7; 122:15
nVidia 39:10

O

O-R-M-C-O 73:14
object 57:14
obligations 35:15
obtain 61:21; 96:11
obtained 59:18, 21; 93:4
occurred 86:13; 88:15
occurring 114:14
occurs 108:15
October 63:15
off 85:24; 86:1; 122:6
offering 19:15
offers 31:23
office 7:1; 13:5; 35:3;
55:9; 62:14; 63:20; 66:8;
127:18, 19
Often 21:11; 28:11
old 113:22
Omega 67:19
Once 19:8; 24:19; 34:17;
35:8, 16; 80:5; 83:7; 86:6;
110:10; 120:17; 122:14,
15
one 715
one 5:23; 6:11; 7:5; 13:14;
21:19; 22:4; 24:6, 12; 26:8;
30:24; 31:13; 32:13, 13,
18; 33:8; 34:17; 35:15;
46:9; 54:12; 55:18, 22;
56:2, 10; 61:21; 64:18;
81:22; 83:3, 5; 85:9, 9, 18;
86:2, 10; 90:9, 22; 91:9;
94:15; 96:5, 24; 99:22;
101:3; 103:22, 22; 114:13;
120:20; 122:21; 124:18;
128:7
one's 66:14
one-man 6:4
ongoing 26:24
online 55:1
only 22:17, 20; 23:18;
33:23; 52:17; 68:11;
74:10; 82:16, 19; 97:7;
128:3
onto 59:15
open 98:14
opening 30:19; 33:18
operate 38:6; 46:22;
48:12; 128:1
operates 108:2
opinion 103:15

opposed 66:20
opposing 76:20
opposing 52:15; 89:1, 6
opposition 39:22, 23
optimum 73:20
option 31:8
oral 11:4, 9; 19:23; 20:10,
12, 14; 21:20; 62:3; 67:3;
80:23; 81:2, 7, 23; 82:2, 8;
83:4; 120:5
order 61:21; 63:8; 74:18;
97:2; 118:5
ordinary 10:22, 24; 39:1;
40:16; 46:5; 91:9
organized 85:6
original 6:1
Originally 54:4
Ormco 73:13; 74:1, 8;
99:23; 100:1, 2, 7, 8, 24;
101:1
orthodontic 74:5
orthodontics 73:18
orthodontist 73:19, 22
others 12:21
otherwise 9:11; 39:16;
124:24
out 5:13; 6:11; 7:2; 10:8;
11:16, 16; 17:6; 20:19;
30:13, 15; 31:10; 33:17;
36:7; 40:9; 42:20; 48:19;
51:3, 4, 17, 24; 54:7;
56:19; 57:19, 23; 59:5, 9;
62:5; 63:9; 64:17; 65:12;
68:16, 20; 71:19; 75:8, 20;
79:8; 81:3; 82:1, 19; 86:11;
87:16; 88:9, 10; 91:13;
92:2, 17, 23; 94:15;
101:12, 14, 14, 17, 21;
102:21; 104:14, 19; 108:4;
113:13; 114:3; 115:3;
120:21; 122:2, 7; 124:6;
128:12, 18
outside 12:15; 15:19;
71:14; 97:11, 22
over 18:22; 31:11; 36:19;
37:5; 38:1; 41:7; 62:10;
74:18, 23; 81:8; 99:3, 16
overcome 12:2, 3; 67:17;
74:18
overlap 9:24
overnight 18:23
own 6:4; 32:12; 54:15;
79:10, 12; 85:1; 113:4

P

p.m 128:23
page 21:20; 22:12; 66:8;
97:9; 98:16
pages 33:17; 89:2
paint 113:24
pan 18:21, 24
paper 30:5; 65:9; 122:6
papers 6:21; 83:15
paragraph 41:18; 75:6

parallel 19:13
pardon 12:18; 35:6;
98:16
parent 61:13
parse 127:23
part 21:22; 92:20; 98:15,
16; 108:6; 113:17; 120:13,
14
particular 21:2; 75:11;
90:13; 97:23, 23; 103:16;
118:16
Particularly 42:14;
51:17; 93:14
parties 33:24; 34:3;
36:10, 18; 41:10; 103:24;
124:24; 127:17, 21; 128:1,
16
parts 41:12
party 18:13; 124:22
Pascale 52:11
pass 65:1; 120:16
passage 20:24; 21:21;
94:13; 97:7
passages 26:7; 28:24;
51:22
passed 88:23
password 18:1
past 54:3
patent 144:3, 3
patent 153
patent 19
patent 20
patent 22
patent 5:1; 6:2, 6; 7:1, 7;
9:6, 15; 10:10; 11:5, 11;
13:5, 6; 17:7; 21:2, 13;
22:11, 16, 18, 22; 23:8, 9,
15; 26:5; 28:9; 33:11; 35:3;
36:4; 37:13; 39:12, 17;
40:10; 41:3, 4; 45:7; 46:2,
7, 23; 48:16; 51:20; 55:9,
16; 56:11, 17, 20, 24; 57:5,
7, 19, 21; 59:10, 22; 61:6,
8, 9, 13, 17, 20; 62:9, 10,
14, 18; 63:13, 14, 15, 17,
18, 19, 23, 24; 64:2, 5, 10;
65:11; 67:1, 2, 4; 73:10,
17; 74:20; 75:12; 79:1, 7,
24; 80:4; 81:22, 24; 82:6,
6, 15, 17, 23; 83:5; 88:2;
89:19; 91:6, 7, 24; 92:10;
93:14; 95:2, 15, 22, 23;
96:6; 100:18; 102:22;
104:3, 8, 18; 111:10, 13;
114:8, 16; 115:6; 118:6,
11, 12, 12; 120:5, 12;
122:5
patented 122:11
patentee 67:11, 15;
75:10; 90:11; 103:4
patentees 68:9
patents 118:9
patents 6:16, 17; 7:5, 9,
18; 9:5; 12:7; 22:18; 28:3,
22; 34:8; 37:19; 39:14;
42:14; 55:11; 56:16;

57:24; 62:15, 15, 19; 67:3;
74:1; 77:14; 79:17; 81:9,
11, 12; 88:2; 90:23; 99:16;
100:21, 22, 23; 102:1;
103:9, 10, 20
pattern 73:15
pay 114:22, 22
paying 114:21
payment 114:3; 115:21,
23
people 6:13; 20:2, 10;
39:1; 49:23; 54:10; 88:8;
113:24, 24; 124:4
peppered 11:12
percent 124:5, 10, 10
perform 30:21; 36:17;
39:7; 40:12, 17, 18; 45:2,
19; 46:6; 48:21; 54:16;
66:16; 93:24
performance 66:18
performed 12:12; 13:7;
19:9; 23:4; 24:13, 15, 20;
46:24; 54:22; 89:14
performing 19:10; 66:21
performs 7:23; 110:14
perhaps 12:12; 13:22;
59:24
person 10:23; 40:16;
45:20; 46:5; 59:5; 73:21;
84; 93:22; 95:12; 118:19;
119:
personal 55:5; 64:21, 23;
85:1
persons 39:15
persuasive 33:7
Pete 33:7
Pharma 67:10
Pharms 67:11
phase 122:15
Phillips 26:22; 28:15
physical 38:8
piece 13:14; 77:22; 94:3
pieces 96:24
pike 79:24
pipeline 86:7
places 56:15; 80:8, 16
plain 11:22; 12:4; 17:13;
23:23; 24:8; 26:4, 14;
28:16; 33:13; 34:8, 15, 22;
35:19, 22; 118:23
plainly 98:10
plaintiff 48:10
platform 79:5, 7
please 12:5; 15:20; 19:6,
18; 20:23; 22:11; 24:24;
32:19; 33:9; 36:12; 37:23;
39:20; 45:24; 51:14;
88:20; 100:13
pleasure 52:11
plenty 23:17
plus 7:16, 18, 20; 36:10,
13, 22; 37:10; 40:21;
46:15; 48:7; 75:3, 16; 77:6;
101:5
pocket 65:8

point 12:6; 15:13, 21;
17:1, 6; 18:11; 19:5, 19;
20:24; 32:1; 36:8; 39:5, 21;
41:2; 42:24; 48:2, 19; 49:8;
52:1; 57:23; 67:6; 73:13;
75:9; 83:9; 90:2, 10, 20;
92:8; 97:5; 99:22; 101:3;
103:22; 114:7; 122:22
pointed 36:7; 51:17
pointing 55:13; 111:12
points 88:22; 89:7; 90:17;
92:15; 93:22; 98:4
policy 124:21
polled 20:13
poo-pooling 90:22
position 19:20; 20:19;
128:20
positioning 73:21; 100:5
positions 100:12
possess 75:5
possibilities 88:9
possible 12:13; 30:4;
118:8; 124:19
powerful 66:3
practice 124:21; 127:4;
128:1
practicing 6:12
preamble 10:11; 12:17;
20:6; 28:19
predated 64:15
preference 92:16
preferred 32:21; 33:5
preliminary 104:19
prep 56:22
preparation 5:7; 31:8;
46:8; 48:1, 20; 49:17, 20;
51:12; 54:2, 9; 55:18, 23;
65:2; 66:9; 108:24
prepare 5:19; 49:16;
83:23; 86:21; 91:17, 22;
96:21; 118:3; 122:1, 8
prepared 54:13, 20;
110:11
prepares 46:22; 120:23
preparing 30:11, 18;
32:24; 33:2; 37:1; 46:17,
18, 24; 49:10; 66:16; 73:3;
94:5, 11; 96:16; 101:15;
119:
presence 12:14; 13:9,
12; 15:17; 19:2; 34:9; 35:9;
111:20
present 24:6; 52:4, 13;
57:15; 93:5; 103:9
presentation 6:24; 9:19;
21:18; 52:13, 19; 83:14;
89:11, 17; 90:22; 92:14,
23; 118:16
presented 24:2; 35:3
presumed 37:14
presumption 12:3;
28:16; 33:13
pretty 113:16
previously 22:2
primary 64:11; 74:2

prime 26:19
principle 67:21
print 51:3
prior 23:1, 21; 37:6; 39:8,
14; 61:4; 63:8, 10; 64:12;
67:18; 74:5, 18; 82:11, 11;
98:4, 23; 99:3, 16; 100:4
probably 57:2; 85:9;
95:13
problem 10:6, 17, 18;
11:3, 21; 79:17, 19; 80:21;
84; 85:22, 23; 86:6, 8, 17;
88:11
problems 10:3; 80:2;
85:11; 87:15; 101:24
procedures 57:20
proceed 35:8; 52:7
proceeding 66:7
process 12:14; 13:13,
20; 15:19; 17:22; 19:4;
20:1, 9; 31:8, 9; 34:16;
35:6, 15; 40:12, 15; 41:12;
45:18, 19; 54:8; 61:17;
71:5, 11; 83:2; 88:4; 91:17;
97:15, 16, 18; 100:6;
101:11, 21; 108:20;
110:11; 115:22; 120:21;
122:14
processed 5:18; 59:20;
61:1, 2, 3; 73:5; 96:11, 17;
118:1
processes 17:19; 59:18;
93:3; 110:6; 120:22
processing 18:6; 30:10,
18, 21; 32:5, 9, 24; 33:1;
38:4; 42:4; 46:21; 73:2;
92:4; 94:5, 10; 96:9, 13;
101:15; 108:16
product 6:11; 93:21;
102:4, 7
products 48:4; 82:18
program 13:24; 30:21;
31:5, 16; 32:5; 38:5; 40:9;
42:5; 48:11; 56:1; 64:24;
65:2; 66:12; 73:17, 20;
93:7; 94:9; 102:12; 114:3;
119:
programs 66:5; 91:5;
93:8; 110:11
progressed 54:8
progression 54:13
promotes 67:22
prompt 32:7
prompts 17:22; 18:1
proof 9:11; 37:16
proper 31:22
properly 87:16
proposed 9:17; 10:4, 19;
15:22; 19:14; 24:3, 17;
28:2; 33:21; 35:12; 49:9;
51:15; 103:24
prosecution 26:12, 21,
24; 34:8; 61:18; 67:9, 13,
22; 68:1, 2; 74:9, 17, 21;
100:4
protects 67:24

provide 26:13; 73:20;
89:5
provided 73:2; 89:1; 93:5
provider 5:14, 15, 17;
45:16, 17; 71:24; 73:1;
96:5, 9, 11, 14; 115:19;
120:21
providers 41:15, 23;
59:19; 77:21; 79:9; 87:1;
104:12; 122:8
provides 45:9, 13, 22
public 31:1; 67:22
public's 67:24
pull 13:18; 85:24, 24
pulled 97:7
pulls 45:17
Purdue 67:10
pure 75:14
purely 114:19
Purple 15:3, 4, 14; 80:24;
81:1, 15, 16, 16; 82:3; 83:3
purporting 21:7
purpose 38:5; 42:5;
48:11
push 108:2; 113:16
put 18:14, 16, 18, 20;
21:11; 40:10; 52:18; 67:8;
80:13; 82:4; 85:2; 110:16
puts 80:14; 91:12
putting 51:4; 80:7

Q

quickly 89:9
quote 30:20; 33:5; 39:10;
64:18; 65:19; 66:9; 67:15;
20; 68:9, 22; 71:2; 73:24;
75:9, 14; 81:18; 100:8;
120:6
quoted 74:8
quotes 33:18
quoting 59:11; 120:4

R

R 54:10
radically 11:22
Radio 46:11; 48:3
raised 39:21; 101:4
raises 39:22; 49:3
ran 87:15
rarely 33:6
Raytek 67:20
re-enter 65:7
reach 5:13; 42:20
read 11:17, 18; 20:14, 16;
22:7; 31:15; 39:10; 61:11;
98:11
readable 1798:11
readable 238:11
readable 38:12; 42:9
reader 39:18

reading 21:8; 83:15, 21;
93:14, 15
reads 10:7
Ready 52:7; 54:18;
110:24
real 17:16; 74:23; 80:2;
113:18
realistic 103:7
realization 5:9
realized 88:22
really 9:15; 36:20; 38:24;
118:8
reason 23:13; 26:20;
61:2
reasonable 98:18
reasonably 81:10
reasons 22:2; 23:17;
51:16
rebuttal 52:2
received 51:9; 80:6
receives 120:17
recent 73:12; 75:7
recently 55:3
recess 52:4, 5
recitation 23:7
recite 17:2; 20:6; 21:24
recited 12:20; 13:1, 5;
35:6, 7; 89:13; 96:23, 23;
104:17; 110:17, 18
recites 61:13
recognize 34:10, 19;
38:18
recognizes 95:16
record 11:4, 18; 12:2;
20:12, 13, 17; 31:2; 67:8
records 64:23
reduces 65:23
reexamination 55:10;
62:13; 63:12, 15, 16, 24;
64:1, 5; 66:7
refer 33:16
reference 22:9; 48:4, 24;
57:13; 64:12, 14, 18;
65:17, 18; 68:21; 83:3;
93:19
references 55:9, 13;
57:1; 94:6; 99:18
referred 46:3; 59:22; 62:3
referring 21:12
refers 21:1, 3; 23:7, 8;
55:17, 18, 23; 56:20
refund 57:17; 111:24
regard 51:24; 56:4; 92:7;
115:16
regarded 28:11
regarding 7:3; 20:20;
97:6; 124:22
registered 93:9
reject 55:10
rejection 64:4, 7, 9; 74:18
rejections 64:12; 67:18
relative 77:2
relatively 73:12; 89:9;

102:21
relevant 31:23; 66:11;
102:7, 11; 104:4
reliance 67:24; 100:7
relied 55:10; 99:6
rely 26:15; 37:5; 68:14
relying 90:3, 11; 91:21
remaining 52:2
remove 19:3
render 10:15; 36:4
renders 7:13
rent 113:21
rental 113:21
repairs 113:23; 119:
repeatedly 75:17; 89:17
reporting 1889:17
reporting 9:21; 10:5;
12:18; 17:3, 4; 19:21;
28:18; 34:6; 35:13, 14, 15;
57:17; 96:2
represent 23:22
represented 80:20
represents 26:24
request 64:2
requested 63:14
requests 63:23
require 32:16; 39:16;
51:12; 91:11; 102:22;
103:5, 6, 6
required 45:10, 22; 71:4;
83:24; 84:
requirement 59:12, 13;
75:10; 89:13; 94:18, 21;
95:6; 118:6
requirements 40:1; 75:6,
18
requires 33:6; 45:10;
68:18; 85:2, 7; 96:20
reserve 52:1
resonates 42:17
respect 73:9; 77:6;
87:15; 90:15
respects 74:16
respond 17:21
responded 66:23;
120:10
responding 18:1
responds 32:7; 94:9
response 23:2; 32:6;
97:15; 108:19; 110:19
responses 110:6
retrieve 5:16; 42:24
return 5:19; 9:14; 12:18;
15:18; 31:21; 33:1; 46:23;
48:13; 49:15, 16; 51:2, 12;
54:17, 23, 24; 55:6, 7, 23;
59:15; 61:7; 65:3, 5; 66:14,
17; 73:4; 86:9, 16, 21;
88:14; 94:11; 95:7, 11, 12;
96:15, 17, 21; 110:12, 20;
118:4; 119:; 120:23;
122:1, 9
returns 49:23; 54:4, 11,
13, 20; 56:7, 10; 61:1;

88:9; 91:22; 92:4
retyping 65:24
Revenue 51:6
revert 128:19
rid 122:6
right 52:6, 21, 22; 56:18;
59:9; 65:16; 80:16; 85:5;
88:17; 113:8, 13
roof 119:
roughly 11:8
rule 128:4
running 85:21
runs 79:3; 98:20

S

S 65:23
S3 39:9
salaries 64:20
sales 102:14
same 9:22; 18:4; 28:20;
46:20; 48:8; 74:7; 75:1;
79:3; 81:10, 11; 89:23;
91:12; 101:13
Sartori 13:4; 71:1, 12, 16;
97:12, 21, 24; 120:9;
122:12
sat 88:23
satisfy 40:1; 97:2
satisfying 35:14
savings 111:2
saw 92:15
saying 22:5, 7, 23; 62:10;
74:8; 80:10; 84:; 95:10;
97:17; 110:20; 120:9;
124:4
scenario 118:19, 20;
122:4
scenes 32:4
scheduled 15:7
schedules 83:22
scope 12:15; 15:8, 16,
19; 19:4; 23:14; 67:13;
68:15; 75:12; 82:10;
100:17; 104:22, 23;
114:18; 115:10; 118:10,
11
screen 31:3, 14, 16;
49:19
seated 52:6
second 192:6
second 10:18; 15:21;
61:8; 85:23
Secondly 30:8; 49:3
section 17:9; 64:17;
68:19; 71:19
seem 95:20; 102:13
seems 103:24
segments 38:6; 42:6;
46:22; 48:12
send 51:2; 65:3; 113:16
Sense 65:22; 66:13;
73:16; 86:23; 88:3; 91:13

sensing 46:1
sensor 46:4
separate 115:13
serious 85:11
server 42:21
Service 51:6
services 42:19
set 122:19
set 15:4; 26:8, 8; 32:22;
40:4; 59:3; 83:7; 91:11;
97:2; 110:15
sets 101:21
setup 113:16; 122:15
several 56:15; 57:1; 75:8
shop 6:4
short 52:4
shorten 18:10
shot 31:16
shots 31:3, 14; 49:19
show 9:11; 21:17; 24:8;
28:6; 31:10; 37:20; 40:16;
51:20; 75:19, 19; 80:18;
92:1; 102:16
showed 92:13; 93:24;
98:8; 100:20
showing 7100:20
shown 31:1, 2; 45:6;
89:3; 98:5; 101:9
shows 24:5; 51:21
shut 87:17
side 20:23; 127:22
sidewalks 114:1
sign 51:6
signals 46:13
signature 49:6; 51:1
signed 49:5; 51:9
significantly 30:9
silent 57:7
similar 32:23; 42:4; 45:5;
46:9; 48:1; 73:15; 93:7, 17
Similarly 45:4; 110:22
simple 95:12; 113:18
simpler 88:10
Simplification 48:10
Simplification 6:3, 20;
7:10; 9:7; 13:3; 19:15;
21:6; 22:21; 24:4, 10; 26:3;
51:10; 55:11; 62:17;
63:12, 22; 64:16; 65:12;
66:23; 68:17; 75:19, 22;
80:24; 82:14; 87:6; 91:19;
97:17; 99:2, 7; 103:20;
114:15; 120:10
Simplification's 7:3;
11:10; 15:12; 23:2; 24:17;
34:5; 35:12; 62:19; 65:11;
74:24; 77:12; 79:17;
100:14, 20, 22
simply 34:4; 40:11;
51:20; 92:12; 94:11;
101:9; 102:22
single 40:14; 68:5; 75:20;
85:19; 88:3; 102:23, 23
sink 18:17, 20

site 119:
sitting 11:10; 26:23; 54:6;
104:13; 127:22
situation 31:22; 32:15;
74:15; 103:19; 104:20;
110:2
six 56:16; 59:10, 22;
92:20, 21; 93:13, 15, 16
skeleton 65:15
skill 10:24; 39:1; 40:16;
45:21; 46:5, 9; 91:9; 93:23
skilled 39:18
skim 38:1
skip 77:4
slender 11:18
slide 12:5; 15:20; 19:6;
18; 22:11; 23:11; 24:24;
28:1, 13; 32:19; 33:9; 34:5,
14, 21; 35:11, 18, 22;
36:12, 12; 37:23; 38:17;
39:20; 42:11; 45:4, 24;
48:8, 23; 49:14; 52:12, 23;
100:13
slides 6100:13
slides 10:2; 88:24; 94:15;
99:24
slogans 74:23
slot 103:14
small 84; 86:1, 1
Smithwick 64:19
Smithwick's 65:7
so-called 55:8
soak 18:22
software 5:7; 15:8;
30:15, 17; 40:4; 46:8; 48:1,
20; 49:17, 21; 55:5, 6;
57:4; 64:24; 66:9, 15;
73:17; 91:5, 6, 14; 92:2;
94:2, 3; 100:16; 101:12;
108:24; 120:15
solution 128:6
solved 80:3
somehow 79:21; 86:9;
118:21
someone 20:5; 87:22
someone's 88:13
sometimes 20:10; 21:13
somewhat 54:9
soon 102:21
sorry 113:1
sort 104:9, 18
source 40:8; 91:12
speaking 20:2
special 24:6; 33:10; 90:2,
12, 13
specific 22:9; 30:13;
48:3, 24; 77:24
Specifically 37:24;
92:19; 111:13
specification 21111:13
specification 7:23; 9:2,
8; 22:8; 28:3, 5, 8, 11, 13,
17; 30:9, 15; 32:22; 33:12,
14, 21, 24; 34:14; 35:24;
36:17; 37:12; 38:4, 10;

42:8; 45:8; 46:2, 12; 49:15;
61:11; 74:1, 11, 14; 75:11,
21; 94:8, 14; 100:3, 10, 15,
21, 23; 101:8, 10, 20;
103:14, 15; 108:23
specifications 74:15;
81:11; 103:8
speed 6:10
spends 90:21
spent 33:17; 89:12;
91:19, 23
standard 10:10; 30:20;
91:4
STANDLEY 52:8, 9, 17,
22; 84; 85:5; 86:22; 90:21;
91:2, 21; 92:21, 24; 94:14;
97:6, 7, 14; 99:4, 24;
101:4, 7, 23; 102:10; 119;
120:3; 122:24; 124:16;
127:11
Standley's 89:11, 20;
92:6
Stanley 17:6; 21:16
start 63:5; 73:19; 97:17
started 100:6
starting 46:13; 82:22;
120:15
state 17:10; 85:13
statement 20:7; 66:2;
80:22; 98:7, 8; 119:
statements 11:15; 20:14;
21:6, 14; 23:14; 62:24;
63:7; 68:1; 74:17; 77:17;
100:3, 14; 104:15
states 33:16, 16; 122:13
Station 62:1
stay 83:17; 86:18
steaks 128:14
step 23:6, 8; 24:20; 30:22;
31:9, 19, 20; 32:9; 35:5;
40:11, 14, 15; 41:7, 9, 13,
22, 23; 42:7; 45:12, 18, 18;
46:24; 48:6; 54:19; 57:4, 7;
59:9, 17, 20, 20, 23; 61:2,
4, 5, 8, 16; 71:3, 4, 7, 20,
21, 22; 73:1, 3, 7; 75:1, 16,
24; 88:16; 92:11, 16; 93:1,
2, 5, 6, 17, 17, 24; 94:3, 20;
95:1; 101:21; 103:2;
108:6, 15, 15, 17; 111:6,
12; 115:7, 13; 120:12, 12
steps 12:14, 20, 24; 13:1,
5, 10, 20; 23:4; 30:11, 18;
32:16; 33:2; 35:6, 8, 9;
41:1, 3, 6; 45:8; 59:21;
71:22; 73:10; 91:14, 18;
96:23; 97:2, 23; 101:10,
15, 18; 104:17; 110:9, 17,
18, 21; 111:20; 118:5, 7;
120:20; 122:14
stick 90:24
still 18:5; 32:12; 35:9;
54:14; 65:14; 88:14;
101:24; 108:12
Stockyard 128:14
stopping 46:13
story 100:22

stream 79:23; 80:9
street 79:14, 15
stress 87:19
stricken 62:14
strong 59:16
struck 89:10
structural 37:7
structure 7:22; 9:3, 9;
36:16; 37:11, 18; 38:2, 3,
14; 39:6, 7; 40:17, 21;
41:1; 42:4, 12; 45:1, 2, 22;
48:6, 10; 62:9; 75:5, 11,
13, 22; 91:24; 92:3; 93:19,
20; 95:18; 96:19; 101:8,
14, 14, 17
structures 38:18; 42:15
Stryker 68:8
stuff 71:8; 85:17; 104:16
subject 39:13; 63:19
submission 54:18
submit 17:11; 34:16;
35:19; 48:12; 51:7; 98:18
submitted 24:4; 34:23;
35:1; 36:2
substantial 5:9
substantially 30:2;
100:18
succeeded 86:23
successful 87:23;
102:18
successfully 88:12
sues 63:13, 22
sufficient 12:3; 37:11;
38:15; 40:15, 21, 24;
42:12; 46:15; 75:5; 92:3;
122:8
suggest 49:10; 95:2;
100:10
suggestions 31:24
sum 26:18; 51:10
summary 57:12; 61:14
superfluous 7:14; 36:5
suppliers 85:21
support 9:3, 9; 12:2;
19:20; 20:18; 24:3; 33:7;
37:19; 38:15; 40:21;
42:12; 45:22; 46:15; 48:6
supported 40:24; 95:17
supports 61:18
supposed 40:18; 45:21;
56:14
Sure 95:14
sure 7:19; 21:16; 61:23;
67:7; 81:10; 85:9; 122:20
surrendered 68:11
survive 23:1
survived 23:20
sweet 86:3
switch 31:11; 122:16
system 38:5; 42:4; 46:21;
57:11; 61:12; 65:20;
79:16; 85:16, 18, 19
systems 35:21; 46:11;
48:3; 79:10, 13, 22; 85:21

T

table 11:11; 54:6; 122:3
talk 77:10; 85:20; 86:3
talked 48:15; 100:1
talking 20:5; 26:3; 56:21;
68:21; 86:13, 14; 89:13;
90:1, 16; 94:15; 98:3;
102:5, 6; 115:9, 17; 122:5
talks 30:1; 91:6; 92:16;
94:16; 95:23; 120:13
tax 18120:13
tax 2420:13
tax 5:4, 6, 9, 10, 14, 15,
16, 17, 18, 19; 9:14, 21;
10:5; 12:17, 18; 13:14;
15:18; 17:3, 3; 19:21;
28:18, 22; 30:2, 6, 14, 17,
20; 31:20, 21, 22, 23;
32:13, 15, 24; 33:1; 34:6;
35:13, 14, 14; 41:14, 15,
21, 23; 42:6; 45:15, 17, 17;
46:8, 23; 48:1, 13, 20;
49:14, 16, 17, 20, 23; 51:2,
8, 12; 54:2, 4, 9, 11, 13, 20,
23; 55:6, 17, 20, 23; 56:4,
7, 22; 57:17; 59:9, 13, 14,
15, 18, 19; 61:1, 1, 3, 4, 7;
65:2, 3, 5; 66:9, 14, 16, 16;
68:24; 71:23; 73:1, 1, 2, 4,
5; 77:20; 79:9; 80:9, 17;
81:21; 83:22; 85:3, 8, 19;
86:9, 13, 16; 87:8, 16;
88:7, 9, 14; 91:17, 17, 17,
22; 92:4; 93:4; 94:11, 20,
22, 23, 23, 23; 95:3, 7, 7, 8,
9, 10, 11; 96:2, 5, 7, 8, 8, 9,
10, 11, 13, 14, 15, 17, 17,
18, 21, 21, 24; 99:17, 19;
100:18; 104:1, 2, 3, 5, 9,
11, 24; 108:12, 18, 23;
110:2, 11, 12, 20; 115:18,
19; 118:4; 119; 120:21,
22, 22, 23; 122:1, 7, 9;
124:10
tax-return 118:2
taxes 5:6; 122:4
taxing 48:13; 56:8; 85:13
taxpayer 31:17; 32:12;
45:13; 51:1; 59:12, 14;
68:24; 81:13, 14, 19;
94:22; 95:6; 104:14;
111:22
taxpayers 51:3; 56:5, 6;
95:15
teach 22:3
teaches 68:24
Tech 73:14
technical 39:17
Technologies 40:2;
73:15
technology 6:9; 30:12,
12; 32:23; 93:18; 94:1
teenager 128:9
teeth 73:21
teller 17:17, 24; 38:23

telling 79:7; 87:5; 110:15
tells 45:20; 46:5; 93:21
ten 64:16; 65:11, 13; 87:3;
124:5, 10
tend 127:17
tenor 20:12
tens 102:17
term 10:8, 10, 11, 13;
17:7; 23:19, 24; 24:9;
28:17, 19; 33:11; 35:4;
36:21; 51:11; 67:12;
90:13; 114:16; 118:17
terms 6:14; 9:2; 11:23;
17:15; 28:7; 34:1; 36:7;
77:3; 114:19
terrible 102:8
testimony 120:2; 127:12,
14
theme 127:24
therefore 23:19, 22;
28:14; 32:19; 33:12;
35:11; 37:15; 100:20
thick 52:17
third 7:15; 11:3; 19:18;
36:9
thirteen 6:14
thirty-five-page 11:8
though 13:1; 18:7; 81:3
thought 5:21; 52:24;
77:13
thousands 102:16, 17
three 11:11, 12; 21:22;
57:12; 85:15
throughout 17:21; 18:4;
28:9; 75:2; 94:8
tied 13:24
ties 24:17; 96:18
times 17:9; 21:22; 87:22,
23, 24
tiny 83:6
title 17:8; 56:24; 61:13;
82:23
today 782:23
today 6:5, 12, 19; 9:19;
52:10; 56:1; 62:2, 20;
77:12; 80:23; 83:20; 124:4
told 39:16; 59:3; 87:5
took 64:6
tooth 100:12
top 81:9; 122:3
totality 74:22
toward 63:5
towards 33:13; 41:8
trademark 93:9
transaction 115:16
transactions 65:21
transcript 11:7, 8, 17;
19:19; 20:16, 22; 21:9, 18;
26:10, 19; 34:12; 51:19;
63:5; 97:8; 98:20
transferred 66:4
transitional 10:11
transmission 15:5
transmit 64:20

transmitted 54:24
treatis 39:18
treatment 28:8
treats 35:24
trial 87:4; 102:12
tried 84:; 87:7, 10, 20, 22
trouble 102:9
troubles 86:15
true 17:5; 102:2; 124:7
truly 19:20
try 31:11, 15; 32:17;
33:19; 67:17; 86:4; 88:5;
127:22; 128:18
trying 20:4; 24:6, 8;
86:18; 102:9; 113:17
TurboTax 30:16, 21;
31:4, 5, 7; 32:23; 46:9;
48:2, 21; 49:21; 55:24;
82:18; 93:9, 19; 94:2;
101:13, 17
turn 94:13; 118:2, 4
turns 11:16
tweaking 104:16
twenty 127:16
two 1127:16
two 6:16; 7:5, 5; 9:20;
21:3, 22, 23; 22:2, 17, 18,
20; 26:; 28:24; 33:17;
38:19; 56:19; 62:6; 86:2;
88:2; 90:6, 7, 23; 113:21;
120:20
type 15:6; 48:21; 108:13;
111:6
typical 83:22
typically 85:6; 124:24;
127:4, 20

U

Ultimately 87:17, 21;
104:21
unambiguous 23:23;
68:5; 82:10
unclaimed 71:21
under 9:9; 28:15; 32:10;
37:15; 40:2, 10; 45:10;
92:3; 93:20; 95:1; 96:6;
114:8, 16; 128:1
underscored 17:14, 16
understands 18:5
understood 39:2
unjustified 12:1
unless 17:12; 122:1
unmistakable 67:12
unnecessary 39:6
unusual 24:7
up 64:7
up 13:24; 15:4, 6; 18:10;
19:4; 23:16; 31:18; 42:7;
59:3; 62:24; 63:4; 80:23;
83:7; 88:23; 97:7; 104:21;
110:15; 122:23
updated 32:3
upon 34:1; 36:6; 55:10

upshot 9:4; 37:12
urges 98:17
USC 37:15
use 12:16; 18:13; 26:21;
32:23; 40:12; 46:6; 65:8;
66:15; 79:6, 8; 87:22;
90:19
used 5:18; 45:19; 66:14;
96:21; 97:16
user 87:10
users 31:7
uses 97:14
using 5:6; 30:11; 31:9;
40:4; 41:15; 49:17; 54:11;
61:1; 73:4; 79:10; 93:6, 18;
96:17; 110:12; 118:21
USPTO 68:13
utilizing 35:21

V

vacuum 46:3
valid 37:15
validity 98:4
various 104:11
Venable 304:11
version 31:3; 65:3;
122:24
versus 37:21; 39:9; 62:1;
67:10, 20; 68:7, 8, 12;
73:14
via 34:16; 35:15; 38:8;
65:4; 66:12
view 98:19
virtually 30:4; 100:19
vision 88:5
Vitronics 33:8

W

W-2 13:14; 87:1, 7; 88:13;
95:13; 104:5; 108:10;
113:6; 118:20
wages 80:11
walked 31:7
wash 18:15, 15, 19, 23;
26:9; 98:21
washing 19:3
Washington 62:4
way 20:7; 35:20, 24;
61:21, 22; 62:19; 63:9;
64:6, 15; 67:17; 80:16;
82:16, 19; 88:1; 98:16, 17;
103:4; 110:16
ways 68:4
weeks 75:9; 113:21
weight 11:19; 101:2
well-established 12:9
well-known 38:20; 39:8,
9; 42:16; 45:3
weren't 24:6
Westlaw 42:18
what's 65:10; 110:2;

111:15; 122:11
whole 11:17, 18; 20:17;
21:9; 33:14; 34:13; 40:9;
82:21; 98:20; 118:13
wife 122:3
wife's 122:6
wine 18:17, 24; 19:3
wise 40:11, 15; 45:18, 18;
101:21
within 7:18; 13:19; 15:8,
8; 100:17; 104:22, 23;
110:17; 114:18; 115:10,
11; 118:10, 11; 119:
without 19:10; 24:14;
34:18; 35:17; 65:6, 8, 9;
87:9; 100:5
won 99:2
wondering 113:4
word 9:16; 12:8; 13:9;
19:24; 22:19; 34:10;
59:16; 89:22
words 12:11; 56:5; 57:9;
66:19; 82:23; 128:2
work 31:18; 55:14; 113:5;
119:; 128:12, 18
worked 88:6
working 32:6; 73:22;
115:5; 120:2
works 80:19; 86:4; 128:4
world 10:10; 79:3; 80:2;
95:3
worse 79:19
worth 99:6, 20
wound 64:6
write 40:9
written 10:13; 39:15
wrong 49:13; 62:12

X

X 80:11, 13

Y

Y 80:11, 13
year 15:3; 65:11; 80:11
years 6:8; 11:13; 39:3;
54:3; 64:16; 65:13; 87:4, 6,
20; 127:17

Z

Z 80:12, 13
zoom 31:15